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No. 10-691

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLIANCE LOGISTICS, INC.,
N/K/A ALLIANCE 3PL CORP.,

Petitioner,

v.

NEW PRIME, INC., D/B/A PRIME INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Alliance Logistics, Inc., n/k/a Alliance 3PL Corp. ("Alliance"), incorporates by reference the Corporate Disclosure Statement in its Petition for Writ of Certiorari.

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ARGUMENT

Respondent New Prime, Inc. ("Prime") does not dispute the importance of the issue raised in Alliance's Petition. Instead, Prime attempts to avoid the issue through obfuscation of the record. However, the record in this case cannot be more clear. The Seventh Circuit, in an opinion drafted by Chief Judge Frank Easterbrook, reversed a jury verdict based on a sufficiency of the evidence issue that it raised *sua sponte* and thereafter denied Alliance's motion for re-hearing to address the never before raised sufficiency of the evidence issue.

The Seventh Circuit's decision is premised entirely on its mistaken belief that Alliance failed to submit either sufficient parol evidence or usage of trade evidence. Prime's Rule 50 motions fail to mention parol evidence or usage of trade evidence, let alone argue that Alliance failed to produce sufficient evidence of either. To avoid any confusion on this point, **Prime's Rule 50 motions are included as Appendices A – C**. Prime also failed to raise a sufficiency of the evidence issue in its appellate brief, which is included as Appendix D. None of the rhetoric in Prime's Response Brief can overcome the blatant omissions in its Rule 50 motions and appellate brief.

The clear record makes this the perfect case to reinforce the express language of Federal Rule of Civil Procedure 50, as interpreted and applied by this Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), and *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317, 325 (1967).

Accordingly, this Court should issue a writ of certiorari to the Seventh Circuit and reverse the Seventh Circuit's opinion and judgment entered on August 2, 2010.

I. The record is clear: Prime did not argue in its Rule 50 motions or appellate brief that Alliance failed to provide sufficient evidence of the meaning of "traffic."

Prime failed to argue in its Rule 50(a) Motion for Judgment as a Matter of Law ("JMOL") or Rule 50(b) Renewed Motion for JMOL that Alliance introduced insufficient evidence of the meaning of "traffic." The record on this issue cannot be more clear. As shown by Prime's Rule 50 motions, which are included as Appendices A - C, Prime never argued that there was a lack of evidence as to the meaning of "traffic." Prime also never made this argument in its appellate brief. *See* Appendix D. Rather, in both Rule 50 motions and on appeal, Prime argued that "traffic" was unambiguous, meant only the hauling of goods, and, therefore, Prime did not breach the contract as a matter of law. R. 117 at 4-5; R. 137 at 3-5.

The quoted portions of the Rule 50 motions in Respondent's Brief refer only to evidence that was presented by Prime. Resp. Br. at 5-6. Prime does not and cannot quote any portion of its Rule 50 motions where it argues that Alliance failed to introduce evidence of the term "traffic." *Id.* Prime does not and cannot quote any portion of its Rule 50 motions where it mentions "parol evidence," much less argues that Alliance did not produce sufficient parol evidence. Prime does not and cannot quote any portion of its Rule 50 motions where it mentions "usage of trade," much less argues that Alliance did

not produce sufficient evidence of usage of trade. These omissions are telling and underscore just how clear the record in this case is that the Seventh Circuit raised *sua sponte* a sufficiency of the evidence issue that was never raised in Prime's Rule 50 motions or appellate brief.

It is also telling that Prime fails to address the unequivocal statements of its trial counsel, who conceded that Alliance did in fact present evidence as to the meaning of "traffic." Prime's counsel expressly advised the court that "[t]here's been testimony on ['traffic'] from both sides" and that "[t]he jury will decide what the definition of 'traffic' is educated by the witnesses in this case."[1] Tr.IV:127-28. In other words, Prime's counsel acknowledged that it could not in good faith argue in a Rule 50 motion that there was insufficient evidence of "traffic" in the record, which is likely why Prime's Rule 50 motions and appellate brief are devoid of such an argument. Prime's failure to address the admissions of its trial counsel further underscores just how clear the record in this case is that the Seventh Circuit raise *sua sponte* an issue that was never raised in Prime's Rule 50 motions or appellate brief.

II. The record is clear: The Seventh Circuit's opinion is based on an insufficiency of the evidence argument that was never raised in a Rule 50 motion.

The Seventh Circuit's decision, authored by Judge Easterbrook, leaves no doubt that it reversed a jury verdict

---

1. District Court Judge Elaine E. Bucklo also specifically noted that there was "conflicting" evidence relating to the meaning of "traffic" in the record. Tr.V:65.

based on an insufficiency of the evidence issue. Indeed, Prime admits, as it must, that the Seventh Circuit's decision was based on Judge Easterbrook's (inaccurate) belief that Alliance did not submit "parol evidence" or evidence of "usage of trade." Resp. Br. at 4 ("[T]he court noted that Alliance had offered no evidence on either point."). The Seventh Circuit clearly and expressly held that Alliance supposedly did not introduce usage of trade evidence as to the general understanding of "traffic" as used in the logistics business:

> The meaning of "traffic" might depend, for example, on the customs and general understandings of the industry, and then the jurors would need **evidence** about usage of trade to reach a verdict. But **neither side introduced any evidence** about how people in the transport (or 3PL) business understand the word "traffic."

App. 7a (emphasis added). According to the Seventh Circuit, Alliance's only "evidence concerned how many loads Prime had carried for Loders before March 2003, rather than the meaning of the word 'traffic'." App. 8a.[2]

---

2. Contrary to the Seventh Circuit's holding, Dan Rimkus, who has been in the transportation business for 19 years (Tr.I:125-26), specifically testified during trial that the term "traffic" includes the logistics management that is required to transport a shipper's goods. Tr.II:69-70. Mr. Rimkus explained that "traffic" obviously meant logistics management because: "that's the business [Alliance] is in. [Alliance is] not a carrier. [Alliance] operate[s] as a logistics management company." *Id.*

The Seventh Circuit also clearly and expressly held that Alliance supposedly did not introduce any parol evidence:

> Alliance **did not offer any parol evidence** showing that, when Prime and Alliance negotiated their contract, they discussed what the word "traffic" means, or that the negotiation history favors one meaning of "traffic" over another.

App. 9a (emphasis added).

This Court should not be blinded by Prime's attempts at obfuscation. Contrary to what Prime is arguing, the Seventh Circuit's decision rests entirely on an insufficiency of the evidence issue that was never raised by Prime in a Rule 50 motion or Prime's appellate briefs.

CONCLUSION

The Seventh Circuit raised *sua sponte* an issue that is unreviewable due to the Prime's failure to properly include it in a Rule 50(a) Motion for JMOL or Rule 50(b) Renewed Motion for JMOL. Thus, the Seventh Circuit's decision, authored by Chief Judge Easterbrook, is in direct conflict with Rule 50 and the Supreme Court's decisions in *Exxon Shipping*, *Unitherm*, and *Nealy*. Moreover, Chief Judge Easterbrook based the Seventh Circuit's decision on an issue that was never contemplated by the parties and never briefed in the district court or on appeal, and then refused to allow Alliance an opportunity to be heard on the issue. Such conduct so far departs from the accepted and usual courses of judicial proceedings as to call for an

exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a).

Accordingly, for the foregoing reasons, and the reasons set forth in Alliance's petition for writ of certiorari, Alliance respectfully requests that this Court issue a writ of certiorari and reverse the opinion and judgment of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — MOTION FOR DIRECTED VERDICT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 07 CV 4944

ALLIANCE LOGISTICS, INC., n/k/a ALLIANCE 3PL CORP., an Illinois corporation,

Plaintiff,

v.

NEW PRIME, INC., et al.,

Defendants.

DEFENDANT'S MOTION FOR DIRECTED VERDICT ON COUNT I

NOW COMES defendant, NEW PRIME, INC., d/b/a PRIME, INC. ("Prime"), a Missouri corporation, by and through its attorneys, CASSIDAY SCHADE LLP, and for its Motion for Directed Verdict on Count I of plaintiff's Complaint at Law, states as follows:

I. FACTUAL BACKGROUND

On August 13, 2007, plaintiff, ALLIANCE LOGISTICS, INC. n/k/a ALLIANCE 3PL CORP.

("Alliance"), filed its Complaint against defendant for breach of contract (Count I) and tortious interference with prospective economic advantage (Count II). Specifically, plaintiff alleges that Prime breached a back solicitation clause of a transportation services contract between Alliance and Prime and interfered with Alliance's business relationship with LODERS CROKLAAN USA, LLC ("Loders") by soliciting Loders' business away from Alliance.

Prime has filed an Answer and Affirmative Defenses to Plaintiff's Complaint wherein it has denied all allegations of wrongdoing.

* * *

On and before April 19, 2000, when Prime and Alliance entered in to their agreement, Prime was a carrier engaged in the business of hauling traffic for shippers throughout the United States. Before April 19, 2000, Prime was aware of shipping traffic coming in and out of Loders' Channahon facility by virtue of pickups and deliveries made by Prime from and to Loders. (See, testimony of Lance Cain, Jim Wilkins, and Dan Rimkus; see also, Alliance's Supplemental Answers to Interrogatories).

On and before April 19, 2000, Alliance was a third party logistics provider engaged in the business of arranging traffic for shippers/consignees and carriers. On April 19, 2000, Prime and Alliance entered into a carrier-shipper contract in which Prime agreed to haul traffic for Alliance's customers. The contract was drafted

by Alliance. (See, testimony of Dan Rimkus). The contract contained a back solicitation clause which provided:

> "Carrier [PRIME] shall not solicit traffic from any shipper, consignee, or customer of the Shipper [ALLIANCE] where Carrier first knew of the availability of such traffic as a result of Shipper's efforts or the traffic of Shipper, consignee, or customer of Shipper was first tendered to Carrier by Shipper."
>
> (A copy of the Alliance/Prime Contract is attached hereto as Exhibit A.)

The contract also provided that the laws of the State of Illinois shall govern the performance of the contract and all disputes arising out of the contract. (See, Exhibit A.)

Between April 19, 2000 and March 1, 2003, Prime continued to be aware of shipping traffic coming in and out of Loders' (which was not yet Alliance's customer) Channahon facility by virtue of 58 pickups and deliveries made by Prime from and to Loders, including 17 shipments in which Loders directly hired Prime to act as its carrier. (See, testimony of Lance Cain).

On March 1, 2003, Alliance signed a three-year contract with Loders to handle all of its inbound and outbound traffic. The contract provided that after three years, the contract would continue unless either party notified the other in writing giving 120 days notice of the party's intention to terminate the contract. From March

2003 to October 1, 2007, Prime hauled traffic for Loders (now Alliance's customer) through its agreement with Alliance.

From 2004 through part of 2006, Marcel Henneman was Head of Supply Chain for Loders. (A copy of the testimony of Mr. Henneman designated to be read is attached to Prime's Motion for Directed Verdict on Count II as Exhibit A, and is incorporated herein). Mr. Henneman testified that Loders was considering replacing Alliance as early as 2004 or 2005. (Exhibit A, p. 17) Loders informally requested that Prime bid on the Alliance contract sometime around November 2005. (Exhibit A, pp. 57-8). Mr. Henneman characterized the contacts between Loders and Prime as follows:

> "Q. At any rate it would have been you that solicited Prime on behalf of Loders rather than Prime's representative soliciting you; is that correct?
>
> A. That is correct."
>
> * * *
>
> "Q. Did you consider Prime's conduct towards Loders in 2005 and 2006 an act of solicitation of Loders' business?
>
> A. No."
>
> (Exhibit A, p. 100).

Appendix A

The formal bidding process for Loders' transportation business began around the end of 2006. (See, Exhibit P25 attached to Defendant's Motion for Directed Verdict, and incorporated herein).

On September 7, 2007, Loders awarded the contract to Prime and C.H. Robinson. Prime would provide the third party logistics services for Loders' bulk transportation, and C.H. Robinson would provide the third party logistics services for Loders' package goods services.

II. DISCUSSION

A **directed verdict should** be **granted** only "[i] f reasonable persons could not find that the evidence justifies a decision for a party on each essential element." Mayer v. Gary, 29 F.3d 330, 335 (7th Cir. 1994).

PRIME DID NOT VIOLATE THE BACK SOLICITATION CLAUSE OF ITS CONTRACT WITH ALLIANCE

In Count I of its Complaint, plaintiff alleges that Prime violated the back solicitation clause of their contract because Prime solicited traffic from Loders. The clause at issue prevented Prime from soliciting traffic from customers of Alliance where Prime first learned of the traffic through its relationship with Alliance. In this case, it is undisputed that Prime hauled traffic for Loders and its customers before Prime signed the agreement with Alliance in 2000. It is also undisputed that Prime hauled traffic for Loders and its customers between 2000 and

2003, before Loders became a customer of Alliance. Accordingly, Prime was aware of the Loders traffic, including the bulk traffic, before Loders was a customer of Alliance. Therefore, as a matter of law, Prime did not violate the back solicitation clause.

Furthermore, Prime did not solicit Loders' business. The uncontradicted testimony of Mr. Henneman unequivocally establishes that it was Loders that solicited Prime as part of a campaign to solicit bids from multiple companies for the business. Accordingly, as a matter of law, Prime did not violate the back solicitation clause by soliciting Loders.

"To state a claim for breach of contract, plaintiff must establish: (1) existence of a valid, enforceable contract, (2) performance of the contract by the plaintiff; (3) a breach by the defendant; and (4) damages resulting from the breach." *Gore v. Indiana Insurance Company*, 376 Ill.App.3d 282, 286, 876 N.E. 2d 156, 161 (1st Dist. 2007).

"When the language of a contract is clear and unambiguous, construction of the contract is a matter of law." *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill.App.3d 263, 269, 790 N.E.2d 934, 940 (2d Dist. 2003). "A court must construe the meaning of a contract by examining the language and may not interpret the contract in a way contrary to the plain and obvious meaning of its terms." Id. "Unless the contract clearly defines its terms, the court must give the contractual language its common and generally accepted meaning." Id. "A court will neither add language or matters to a

contract about which the instrument itself is silent, nor add words or terms to an agreement to change the plain meaning of the parties as expressed in the agreement." *Id.*

Prime was aware of the availability of the Loders traffic before Prime contracted with Alliance and before Loders became a customer of Alliance.

The back solicitation clause at issue prohibited Prime from soliciting traffic from any shipper "where [Prime] first knew of the availability of such traffic as a result of [Alliance's] efforts or the traffic of [Alliance], consignee or customer of [Alliance] was first tendered to carrier by [Alliance]." The plain meaning of this clause is that Prime was prohibited from soliciting traffic that it first became aware of through its work for Alliance. The uncontroverted testimony of Mr. Wilkins and the plaintiff's Supplemental Answers to Interrogatories clearly establish that Prime's hauling of goods, particularly the bulk traffic, to and from Loders prior to the contract between Alliance and Loders constituted "traffic". It is undisputed that Prime was aware of the traffic, including the bulk traffic, to and from Loders' Channahon facility by virtue of the pickups and deliveries made by Prime from and to Loders before Loders became a customer of Alliance in 2003. Prime has produced uncontradicted documentary evidence and testimony regarding this traffic. Therefore, the only reasonable conclusion to be drawn from the evidence is that Prime knew of the availability of Loders traffic, including the bulk traffic, before Alliance had any relationship with Loders, and knew of the traffic, including the bulk traffic, before Alliance tendered any Loders traffic to Prime. As

a matter of law, Prime did not breach the back solicitation clause and, accordingly, Prime is entitled to a directed verdict in its favor and against Alliance on Count I of the Complaint.

Prime did not solicit Loders' transportation business.

Pursuant to the language of the back solicitation clause, the fact that Prime first learned of the Loders traffic before it contracted with Alliance and before Loders was Alliance's customer gave Prime the right to solicit Loders' business. However, the evidence clearly establishes that Prime did not solicit Loders. There has been no testimony or evidence introduced during the course of discovery that Prime initiated any contract discussions with Loders before Loders solicited bids on the open market. In fact, Mr. Henneman clearly testified that it was Loders that solicited Prime, and that Prime did not solicit Loders. As a matter of law, Prime did not solicit Loders' transportation and, accordingly, Prime did not breach the back solicitation clause and is entitled to summary judgment in its favor and against Alliance on Count I of the Complaint.

Appendix A

CONCLUSION

WHEREFORE, defendant NEW PRIME, INC., d/b/a PRIME, INC. ("PRIME"), a Missouri corporation, prays for an Order granting a Directed Verdict in its favor and against plaintiff.

CASSIDAY SCHADE LLP

By: /s/ Kyle R. Burkhardt
Attorneys for Defendant,
NEW PRIME, INC., d/b/a PRIME, INC.

APPENDIX B — RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

No. 07 CV 4944

Judge Bucklo

Magistrate Judge Cox

ALLIANCE LOGISTICS, INC., n/k/a ALLIANCE 3PL CORP., an Illinois corporation,

Plaintiff,

v.

NEW PRIME, INC., et al.,

Defendants.

DEFENDANT NEW PRIME, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

NOW COMES Defendant, NEW PRIME, INC., d/b/a PRIME, INC., (hereinafter "Prime"), a Missouri corporation, by and through its attorneys, James A. Foster and Cassiday Schade LLP, and pursuant to Rule 50(b) and Rule 59 of the Federal Rules of Civil Procedure,

respectfully moves this Honorable Court to enter judgment in its favor as a matter of law as to Count I of Plaintiff's Complaint, or, in the alternative, respectfully moves this Honorable Court for a new trial as to Count I. In support hereof, Prime states as follows:

1. Alliance Logistics, Inc., n/k/a Alliance 3PL Corporation, an Illinois corporation, (hereinafter "Alliance") filed a three count Complaint against Prime on August 31, 2007. Count III was dismissed before trial. The case went to verdict on Counts I and II of Plaintiff's Complaint. In Count I, Alliance sought damages under a breach of contract theory. In Count II, Alliance sought damages for tortious interference with the contract.

2. On August 14, 2009, after the trial of this matter before a jury, this Honorable Court entered judgment on behalf of Alliance as to Count I of Plaintiff's Complaint, and entered judgment in favor of Prime as to Count II of Plaintiff's Complaint.

3. The evidence adduced at the time of trial in this action so overwhelmingly favored Prime that reasonable jurors could arrive only at a verdict in Prime's favor. An objective review of the facts and inferences arising from those facts demonstrates that Prime is entitled to judgment as a matter of law pursuant to Federal Rule 50, the evidence being insufficient to support a verdict in favor of Alliance on Count I. As such, the jury's verdict in Alliance's favor on Count I should be set aside and judgment entered on Prime's behalf.

4. Alternatively, the verdict of the jury as to Count I is contrary to the manifest weight of the evidence such that this Court should exercise its discretion and grant the Defendant Prime a new trial on all issues as to Count I, setting aside the jury verdict in favor of Alliance and against Prime and the judgment entered thereon.

5. Lastly, and respectfully, this Court committed prejudicial error by excluding the testimony of Prime's expert witness, Lana Batts, by allowing the expert testimony of Alliance's expert witness Robert Walters, by allowing into evidence Prime's contracts with other companies, by admitting into evidence Prime's Response to Plaintiff's Local Rule 56.1 Statement of Facts, by refusing to give Prime's Instruction No. 32 (IPI 700.11) which instructed the jury on a necessary element of Plaintiff's cause of action, and refusing to give Prime's Instruction No. 34 (IPI 700.11 V) which appropriately asked the jury to answer a question on an essential element of Plaintiff's cause of action. As a result of some or all of the above rulings, the jury heard solely from Alliance's expert on the issues relating to the meaning of the contract. The Court's rulings on the above and related matters respectfully were unduly prejudicial to Prime such that Prime was denied a fair trial and a new trial should be afforded to it.

6. Prime submits the attached Memorandum of Law in support of this Motion.

WEREFORE, Prime respectfully requests that this Honorable Court enter an Order for judgment as a

matter of law in favor of Prime as to Count I of Plaintiff's Complaint, or in the alternative, an Order granting Prime a new trial on all issues as to Count I.

Respectfully submitted,

Cassiday Schade LLP

By: /s/ James A. Foster
Attorney for Defendant, New Prime, Inc. d/b/a Prime, Inc., a Missouri Corporation

APPENDIX C — MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 07 CV 4944

Judge Bucklo

Magistrate Judge Cox

ALLIANCE LOGISTICS, INC., n/k/a
ALLIANCE 3PL CORP., an Illinois corporation,

Plaintiff,

v.

NEW PRIME, INC., et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NEW PRIME, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Appendix C

Defendant NEW PRIME, INC., d/b/a PRIME, INC., (hereinafter "Prime") by and through its attorneys, James A. Foster and Cassiday Schade LLP, hereby submits the following memorandum in support of its motion pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure, for judgment in its favor as a matter of law as to Count I, or, in the alternative, for a new trial as to Count I.

I. INTRODUCTION

Plaintiff Alliance Logistics, Inc. n/k/a Alliance 3PL Corporation (hereinafter "Alliance") filed a three count Complaint against Prime. Count III (tortious interference with contract) was dismissed prior to trial. This case went to verdict on August 14, 2009 on Count I (breach of contract) and Count II (tortious interference with prospective economic advantage). On August 14, 2009, the jury returned a verdict in favor of Prime as to Count II and against Prime as to Count I. The jury awarded damages against Prime as to Count I in the amount of $2,161,229.26.

Prime respectfully requests for the reasons enumerated below that this Honorable Court enter judgment as a matter law in favor of Prime as to Count I, or in the alternative, a new trial as to Count I.

Appendix C

II. PRIME IS ENTITLED TO JUDGMENT AS A MATTER OF LAW SINCE THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A VERDICT IN FAVOR OF ALLIANCE ON ITS BREACH OF CONTRACT ACTION.

Rule 50(b) allows a party to file a Renewed Motion for Judgment as a Matter of Law following the jury's verdict. In cases where this Court's jurisdiction rests on diversity of citizenship, state law governs whether the Court should enter judgment as a matter of law. Pennsylvania Trucklines, Inc. v. Solar Equity Corporation, 882 F.2d 221 (7th Cir. 1989). Under Illinois law, a court should enter judgment as a matter of law when the evidence, when viewed most favorably to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could stand. Pedrick v. Peoria & ERR, 37 Ill.2d 494, 229 N.E.2d 504 (1967). This standard "does not require a complete lack of evidence to support the non-movant's claim. Rather, a directed verdict is still proper when there is only a mere scintilla of evidence to support the nonmovant's allegations." Pennsylvania Trucklines, Inc. v. Solar Equity Corp., 882 F.2d 221 (7th Cir. 1989). Judgment as a matter of law is also appropriate where the evidence allegedly supporting the non-movant's claim loses significance when viewed in the context of all the evidence. Id. Prime submits that it is entitled to judgment as a matter of law as to Count I of Plaintiff's Complaint because the evidence adduced at trial was insufficient to establish either that Prime breached the contract, or that the damages allegedly sustained by Alliance resulted from Prime's breach.

Appendix C

A. The evidence adduced at trial was insufficient to establish that Prime breached its contract with Alliance.

In order to prove a claim for breach of contract under Illinois law, the plaintiff must establish: (1) the existence of a valid, enforceable contract, (2) performance of the contract by the plaintiff; (3) a breach by the defendant; and (4) damages resulting from the breach. *Gore v. Indiana Insurance Company*, 376 Ill.App.3d 282, 286, 876 N.E.2d 156, 161 (1st Dist. 2007). Plaintiff must prove each and every element of this cause of action and the failure to prove one is fatal to plaintiff's claim.

Prime and Alliance entered into a Carrier-Shipper Transportation Agreement on April 19, 2000. The pertinent language in the contract between Prime and Alliance stated as follows:

> 11. Carrier shall not solicit traffic from any shipper, consignee, or customer of Shipper where Carrier first knew the availability of such traffic as a result of Shipper's efforts or the traffic of Shipper, Consignee, or Customer of the Shipper was first tendered to Carrier by Shipper. If Carrier breaches this Agreement and directly or indirectly solicits traffic from the Customers of Shipper, Carrier shall be obligated to pay Shipper a commission of 20 percent of the transportation revenue resulting from traffic transported by Carrier for Shipper's customers for period of 18 months.

Appendix C

(Please see copy of Contract attached hereto and incorporated herein by reference as Exhibit A.)

When the language of a contract is clear and unambiguous, construction of a contract is a matter of law for the court. *Dean Management, Inc. v. TBS Construction, Inc.* 339 Ill.App.3d 263, 269, 790 N.E.2d 934, 940 (2d Dist. 2003). The court may not construe the meaning of a contract in a way contrary to the plain meaning of its terms. *Id.* Under the terms of the contract, the carrier Prime breached the contract only if Prime solicited traffic from any customer of Alliance where Prime first knew the availability of such traffic as a result of Alliance's efforts, or if Prime solicited traffic from a customer of Alliance that was first tendered to Prime by Alliance. The evidence submitted at trial clearly established the following facts. (Please see Affidavit of trial counsel James A. Foster attesting to the accuracy of the facts submitted herein, attached hereto as Exhibit B.):[1]

a. Before April 19, 2000, Prime knew of traffic coming in and out of Loders' Channahon facility by virtue of shipments made by Prime for Pillsbury; (Defendant's Trial Exhibit 2 and testimony of Lance Cain.)

b. Between April 19, 2000 and March 1, 2003, Prime continued to know of shipping traffic coming in and out of Loders' (which was not yet Alliance's customer) Channahon facility by virtue of pickups and deliveries made by

Prime from and to Loders. (Defendant's Trial Exhibits 1, 2, 4 and 10, and testimony of Lance Cain.).

c. The transportation of Loders' products to and from Loders' facility is called "traffic." (Testimony of Jim Wilkins).

d. Loders solicited Prime about Loders' business and Prime did not solicit Loders. (Testimony of Marcel Henneman).

These facts establish that Prime first knew about the availability of traffic from Loders not as a result of Alliance's efforts or a first tender by Alliance. The evidence was undisputed on the issue as to whether Prime made shipments at Loders for Pillsbury before entering into its contract with Alliance. By the very terms of the contract, Prime was prohibited from soliciting traffic from customers of Alliance only where Prime first knew of the availability of that traffic as the result of Alliance's efforts. Further, Prime performed shipments for Loders before the Alliance/Loders contract of March 1, 2003.

---

1. Counsel for Prime has requested the daily transcripts from the trial of this matter. To date, those transcripts have not been received. The factual allegations contained in this Motion and Memorandum are therefore attested to by trial counsel James A. Foster in his Affidavit, attached hereto and incorporated herein by reference as Exhibit B. When the transcripts of proceedings become available, the Defendant Prime will supplement this Motion with pertinent attachments if the Court so desires.

Prime did not, therefore, breach its contract with Alliance since Prime made shipments from Loders which predated its contract with Alliance and Prime made shipments for Loders before the Alliance / Loders contract of March 1, 2003. Finally, Marcel Hennman, the Loders' employee who initiated the investigation into new options for Loders' Logistics, testified unequivocally that it was Loders that solicited Prime, and that he did not believe Prime solicited Loders.

The Court erred by not entering judgment as a matter of law in favor of Prime prior to submission of this case to the jury. Moreover, the jury disregarded these facts in entering its verdict on Count I. Prime respectfully requests that this Court enter judgment as a matter of law in its favor on Count I since the evidence failed to establish that it breached its duty under the contract terms.

B. The Evidence Was Insufficient To Establish That The Damages Allegedly Sustained By Alliance Resulted From A Breach Of Contract By Prime.

In a contract action, in addition to demonstrating that the defendant has breached its contract, Plaintiff must also establish that any alleged damages resulted from the breach of contract. *Gore v. Indiana Insurance Co.*, 376 Ill. App.3d 282, 286, 876 N.E.2d 156, 161 (1st Dist. 2007). In the present case, however, the evidence adduced at trial established that the loss of Loders' business resulted from Loders' displeasure with Alliance's performance and not the solicitation of traffic by Prime. The evidence at trial established the following facts:

a. Loders was dissatisfied with the level of service that Alliance was providing. (Testimony of witnesses Melina Green and Karl Mueller);

b. Loders terminated Alliance because of Alliance's service issues. (Testimony of Karl Mueller and Melina Green);

c. Nothing that Prime did or said caused Loders to terminate Alliance. (Testimony of Karl Mueller.)

These facts establish that there was an independent cause for the interruption in the business relationship between Alliance and Loders - that being Loders' dissatisfaction with Alliance's performance.

Secondly, the facts adduced at trial established that Alliance's loss of traffic with Loders also resulted from Loders' solicitation of bids from several carriers, including, but not limited to Prime. The testimony established the following:

a. Loders initiated a bidding process for its transportation business around the end of 2006. (Testimony of Melina Green);

b. Ms. Green of Loders initiated the contact with various entities. (Testimony of Melina Green);

c. Loders invited 8 or more entities to make bids for their transportation business. (Testimony of Melina Green);

d. Loders contacted Prime in order to obtain its bid. (Testimony of Melina Green).

e. Alliance was not invited to compete for Loders' business. (Testimony of Karl Mueller and Melina Green.)

Any loss of Loders' traffic sustained by Alliance, therefore, did not result from any breach of contract by Prime, but instead resulted from Loders' displeasure with Alliance's performance and Loders' election to actively seek alternative carriers. Neither Loders' displeasure with Alliance nor its decision to shop its business for bids constituted a breach of contract by Prime. As such, there was insufficient evidence introduced at the time of trial to establish that it was Prime's breach of its contract that resulted in Alliance's loss of Loders' business. Prime, therefore, is entitled to judgment as a matter law on Count I since Plaintiff failed to establish that the loss of the Loders' business resulted from Prime's breach of contract rather than its own poor performance and its customers' decision to shop elsewhere.

For the reasons stated above, Prime is entitled to judgment as a matter of law as to Count I. The evidence at trial was insufficient to support a verdict in favor of Alliance on its breach of contract claim.

Appendix C

III. THE JURY'S VERDICT ON COUNT I IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND MANDATES THAT THE DEFENDANT BE

GRANTED A NEW TRIAL. Federal Rule 59(a)(1)(A) provides that the court may grant a new trial for any reason "for which a new trial has heretofore been granted." In considering motions for a new trial, the federal standard applies in diversity cases. *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989). The federal standard allows this Court to order a new trial where the jury's verdict is against the clear weight of the evidence. *Hardin Rodriguez & Boivin Anesthesiologists Ltd. v. Paradigm Insurance Co.*, 962 F.2d 628, 640 (7th Cir. 1992). A motion for new trial can be based upon the unfairness of the trial to movant and may raise questions of law arising out of alleged errors in either the admission or rejection of evidence or in the instructions. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 194. Finally, a motion for new trial may be granted if the court believes it has committed error or because the court believes that the verdict is incorrect, though supported by some evidence. *Marsh v. Illinois Central R.Company*, 175 F.2d 498, 500 (5th Cir. 1949).

A. Prime Is Entitled To A New Trial Because The Jury's Verdict Was Against The Clear Weight Of The Evidence.

For the reasons discussed above in Prime's Motion for Judgment as a Matter of Law, Prime seeks in

the alternative a new trial because the jury's verdict was against the clear weight of the evidence. Prime reincorporates the arguments made above in support of its Motion for Judgment as a Matter of Law as and for its arguments in support of a new trial because the verdict as to Count I was against the clear weight of the evidence.

B. Erroneous Rulings Concerning The Admissibility Or Exclusion Of Certain Evidence Unfairly Prejudiced Prime.

1. The trial court erred in granting Alliance's Motion *in Limine* No. 1 to exclude the testimony of Prime's expert Lana Batts.

Rule 702 requires that an opinion witness must be qualified as an expert by knowledge, skill, expertise, training, or education, that the testimony must be based upon sufficient data or facts, that the testimony must be the product of reliable principles, and that the witness must apply the principles reliably to the facts of the case. Fed.R. Evid. 702. Prior to trial, the Court entered an order granting Plaintiff's Motion *in Limine* No. 1 to exclude the testimony of Prime's expert, Lana Batts. (Please see minute order of July 13, 2009, attached hereto and incorporated herein by reference as Exhibit C.) The Court noted that it relied upon Ms. Batts' report in reaching its decision and further stated "she does not refer to industry knowledge, custom or practice or otherwise provide any expert knowledge that would assist the jury in interpreting either the clause or the facts. .... She offers no expert knowledge that would assist the jury

in its deliberations." (Please see Exhibit C.) This Court made the determination that Ms. Batts' testimony would not assist the trier of fact to understand the evidence. (Please see Exhibit C.)

Ms. Batts' report, however, contains several instances where she referred to industry practice in delineating her opinions. For instance, Ms. Batts stated in her report that it was "simply not industry practice" to require Prime to "carve out" Loders' business when Prime signed its contract with Alliance in 2000. (Please see report of Lana Batts, attached hereto and incorporated herein by reference as Exhibit D, p. 6.) Ms. Batts also indicated that Loders' decision not to tell Alliance about the companies it was reviewing was a "good general business policy of shippers." (Please see Exhibit D, pp. 8.) Ms. Batts stated that "based upon [her] knowledge of shippers, very few are comfortable providing 50 percent of a carrier or logistics provider's business; the shipper is simply too exposed if the provider fails." (Please see Exhibit D, p. 12.) Ms. Batts went on to state that it was a "normal course of business for shippers like Loders to seek out other options and turn to a larger, better financed, more technology proficient business ..." (Please see Exhibit D, p. 12.) Ms. Batts stated that it was her opinion "that it is industry custom and practice to remain guarded in dealings with the incumbent provider who was going to be replaced." (Please see Exhibit D, p. 14.) Ms. Batts also described the trend in the transportation industry at length as a basis for Loders' decision to end its relationship with Alliance. (Please see Exhibit D, p. 23.) The above are specific and distinct examples of opinions that Lana Batts offered in

her report concerning industry practice on issues directly relevant to Plaintiff's breach of contract claims. Ms. Batts' opinion contradicted Alliance's expert's opinion that some carriers carve out customers when negotiating a back solicitation clause. Ms. Batts' knowledge about these industry practices would have assisted the jury in the evaluation of the conduct of Alliance, Loders, and Prime. While the court's ruling was based upon its finding that Ms. Batts did not refer to industry knowledge, custom or practice, the above references to Ms. Batts' report indicate that Ms. Batts did so.

Prime moved for reconsideration of the Court's order excluding the testimony of Lana Batts. (Please see Motion for Reconsideration, attached hereto and incorporated herein by reference as Exhibit E.) In response to this Motion, the Court ordered that Lana Batts' testimony be excluded because Ms. Batts was unqualified to offer her opinions. First, this was not the Court's ruling when it first considered Plaintiff's motion to exclude Ms. Batts' testimony. The Court made no mention in its order of July 13, 2009 that Ms. Batts' report failed to establish her qualifications to offer opinions.

Second, Ms. Batts' report amply demonstrates her qualifications on the issue about which Alliance's expert was permitted to testify: the circumstances under which a carrier will carve out a customer in a back solicitation clause. Ms. Batts' report outlines her 35 years of experience in the trucking industry and her experience with industry practice in carrier/broker contracts. (Please see Ex. D, p. 3-6.) The evidence, therefore, established Lana Batts' qualifications on a relevant issue in the case

and further established her familiarity with industry custom and practice.

Finally, Prime made an offer of proof at trial as to Lana Batts' qualifications to testify as an expert witness. In its offer of proof, Prime established that, by her education and experience, Ms. Batts was very familiar with the importance which carriers placed upon their customer lists and that it was not the custom in the industry to simply hand them over to brokers by carving them out of a back solicitation clause. Therefore, she concluded, it was not the standard in the industry for carriers to turn over their customer lists to brokers when negotiating a contract with a back solicitation clause. Plaintiff could have cross-examined Lana Batts on the issue of her experience with such contractual issues which should have gone to the weight to be afforded her testimony, not its admissibility.

By excluding the testimony of Lana Batts, the jury was denied the opportunity to assess the conduct of Alliance, Prime, and Loders against the industry custom and practice. Ms. Batts specifically indicated in her report that requiring Prime to carve out Loders at the time it entered into its contract with Alliance was not industry practice since Alliance did not at that time have a contract with Loders. This would have had a direct impact upon the jury's assessment of Prime's behavior. The jury was denied the ability to assess this behavior in light of the custom and practice as established by Ms. Batts.

Ms. Batts also placed in context in her report Alliance's desire to utilize a larger, more sophisticated logistics business in light of Loders' growth and the trends

in the industry. Again, this information would have placed in context Loders' decision to discontinue its relationship with Alliance. This context would have allowed the jury to determine that any loss of business sustained by Alliance was secondary to Loders' decision to turn elsewhere in a developing, changing industry. The exclusion of Ms. Batts' opinions on this issue prevented the Defendants from introducing their defense to Alliance's claims that the loss of its relationship with Alliance was secondary to Prime's solicitation.

As will be discussed further below, the error in excluding Ms. Batts' testimony was compounded by this Court's decision to allow Alliance's expert witness, Robert Walters, to testify. The Court's order excluding Lana Batts from testifying at trial severely prejudiced Prime's ability to establish its primary defenses in this case: that it did not breach its contract with Alliance and that any damages incurred by Alliance did not result from Prime's breach. Prime is entitled to a new trial on this issue.

2. **The trial court erred in denying Prime's motion *in limine* No. 1 to bar the testimony of Alliance's expert witness Robert Walters.**

The Court denied Prime's motion to bar Alliance's expert, Robert Walters from testifying at trial. (Please see Exhibit C, p. 1.) The Court restricted Mr. Walters' opinions, however, to the purpose of a back solicitation clause, how they are used in the industry, and the custom in the industry to carve out customers from back solicitation clauses. (Please see Exhibit C.)

Appendix C

The Court then allowed Robert Walters to testify at trial about the custom in the industry with respect to carving out customers from back solicitation clauses. (Testimony of Robert Walters.) While testifying that some shippers carve out their customers specifically when dealing with back solicitation clauses, Mr. Walters also testified that some carriers do not. (Testimony of Robert Walters.) Mr. Walters' testimony that some carriers in the industry carved out customers in contracts involving back solicitation clauses and some did not did not assist the jury in determining whether Prime breached its contract by failing to do so in this case. Instead, Mr. Walters' testimony was confusing and allowed the jury to speculate on the issue as to whether Prime breached its contract by failing to carve out Loders.

This error was compounded by the Court's order excluding the testimony of Lana Batts specifically on the issue of whether or not carriers carve out customers such as Loders' under the normal industry practice. These errors were further compounded by allowing Alliance to argue in its closing that Mr. Walters was the only expert in the case who testified on this issue. The succession of these rulings prejudiced Prime. The jury heard solely from Alliance's expert on the issues relating to the meaning of the contract. Either both experts should have been permitted to testify on these matters, or neither should have been permitted to do so. The unfair prejudice resulting from having only one side's expert testify was compounded by the court's failure to instruct the jury on the meaning of the contract. These rulings severely prejudiced Prime's ability to defend itself on one of the

elements necessary to Plaintiff's proof. Prime is entitled to a new trial on this basis.

3. The trial court erred in introducing evidence of other contracts between Prime and other carriers and in allowing the jurors to take the contracts back to the jury room.

Over Prime's objections, Alliance was allowed to introduce into evidence Plaintiff's Exhibits 51, 52, 53, 54, 55, 56, 57, and 58 which were copies of contracts between Prime and other carriers. Prime objected, arguing that admitting these unrelated contracts into evidence would place before the jury irrelevant, prejudicial, and confusing evidence. The Court overruled Prime's objections and not only admitted them into evidence, but allowed the jury to view them in the jury room. Prime is entitled to a new trial on this basis.

4. The Court erred in allowing Alliance to utilize Prime's Response to Plaintiff's Local Rule 56.1 Statement of Facts as admissions against Prime.

Over Prime's objection, Alliance was permitted to introduce Prime's Response to Plaintiff's Local Rule 56.1 Statement of Facts as judicial admissions. It was improper to do so. Local Rule 56.1 responses should not be introduced as admissions in the trial of a case for several reasons. *Chen v. Mayflower Transit, Inc.* 2004 WL 2535258 (N.D. Ill. 2004). In *Chen*, the court determined that admitting such responses into evidence

was unnecessary because, by rule, the statement had to be supported by "affidavits, parts of the record, and other supporting materials ..." (Citing L.R. 56.1(a)). The court also determined that introducing the response as evidence was redundant in light of the request to admit procedure outlined in Rule 36 of the Federal Rules of Civil Procedure.

Similarly, in *TIG Insurance Co. v. Giffin, Winning, Cohen & Bodewes*, 2002 WL 31870528 (N.D.Ill. 2002) plaintiff sought to exclude evidence inconsistent with defendant's judicial admissions made in the form of defendant's non-response to plaintiff's Local Rule 56.1 Statement of Facts. In denying plaintiff's motion, the court determined that the defendant's failure to respond to the statement of facts was not an admission and the court would not hold defendant to it. (*Id.)*

It was improper, unnecessary, and redundant to introduce Prime's Response to Plaintiff's Local Rule 56.1 Statement of Facts as admissions. Prime's Responses did not constitute sworn testimony or affidavits. Alliance's improper use of Prime's Response prejudiced Prime's ability to defend itself and warrants a new trial.

C. The Court Committed Errors In Ruling On Jury Instructions Tendered By Prime.

1. The Court erred in refusing Prime's tendered jury instruction No. 32, IPI 700.11.

IPI 700.11 instructs the jury on an essential element of Plaintiff's breach of contract action - determining whether

the Plaintiff sustained damages as the result of the Defendant's breach of contract. Defendant's Instruction No. 32 provided in pertinent part that "Alliance must prove it sustained damages resulting from Prime's breach. To recover on its claim, Alliance must prove that because of Prime's breach of the contract, it has been damaged." (Please see Defendant's Instruction No. 32, attached hereto and incorporated herein by reference as Exhibit F.) Instead, the Court submitted Instruction No. 19 to the jury which advised the jury that as to Count I, Alliance only had the burden of proving that New Prime breached the contract. (Please see the Court's Instruction No. 19, attached hereto and incorporated herein by reference as Exhibit G.) Nowhere in the jury instructions was the jury advised that it had to determine that Alliance's alleged damages resulted from Prime's breach of contract, despite the fact that causation is a necessary element of a breach of contract action under Illinois law and despite the fact that the Illinois Pattern Instructions require its use in breach of contract claims. The "notes on use" for IPI No. 700.11 state that "this instruction defines the fourth element that the plaintiff must prove in order to recover on a breach of contract claim."

When evaluating the propriety of jury instructions, the courts determine if the instructions accurately stated the law. *Schobert v. Illinois Department of Transportation*, 304 F.2d 725 (7th Cir. 2002). Jury instructions must be correct legal statements. *(Id.)* If a jury instruction acts to mislead the jury on the law, then a party is prejudiced and reversal of a jury verdict is required. (*Id.*, 304 F.3d 725, 730.)

Appendix C

The Court's failure to instruct the jury on one of the necessary elements to a breach of contract cause of action severely prejudiced Prime's ability to defend itself. One of Prime's primary defenses in this case was its assertion that any damages sustained by Alliance resulted from Alliance's poor performance and Loders' independent decision to hire Prime and C.H. Robinson. If the jury determined that Alliance's loss of business resulted from these factors, rather than a breach of the contract by Prime, then the jury's verdict would have been for Prime as to Count I. By failing to instruct the jury on the issue of causation, the jury believed that it could find in Alliance's favor simply if Prime breached its contract with Alliance. This was insufficient as a matter of law and was so misleading to the jury that Prime was prejudiced in a manner warranting a new trial. This error was part of a larger failure to instruct the jury on the meaning of the contract.

2. The Court erred in refusing Defendant's tendered Jury Instruction No. 34, IPI 700.11 V.

The Court erred in refusing to utilize Defendant's Instruction No. 34, IPI 700.11 V. The instruction would have required the jury to answer the following question:

> Did Alliance prove it sustained damages as a result of Prime's breach of the contract? (Please see Defendant's Instruction No. 34, attached hereto and incorporated herein by reference as Exhibit H.)

Appendix C

This was the question submitted to the Court on Defendants Instruction No. 34 which was identical to Illinois Pattern Jury Instruction 700.11 V.

Federal Rule 49(b)(1) provides that:

> The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both. F.R.C.P. 49(b)(1), 28 USCA.

Nowhere in the jury instructions received by the jury was this jury instructed as to one of the four elements of the breach of contract action - causation. The Court's refusal to accept Defendant's Jury Instruction No. 32 was compounded by its refusal to accept Defendant's Instruction No. 34. This allowed the jury to find in favor of Alliance without assessing the issue as to whether Alliance's damages were caused by Prime's breach. The instructions read by the jury, therefore, did not accurately state the law in Illinois with respect to a breach of contract action, resulting in a prejudicial denial of Prime's right to pursue its causation defense, and requiring a new trial. *Schobert v. Illinois Department of Transportation*, 304 F.3d 725 (7th Cir. 2002).

Appendix C

IV. CONCLUSION

Prime respectfully requests that this Honorable Court enter judgment as a matter of law in its favor on Count I or, alternatively, grant Prime a new trial as to Count I.

Respectfully submitted,

Cassiday Schade LLP

By: /s/ James A. Foster
Attorney for Defendant, New Prime, Inc. d/b/a Prime, Inc., a Missouri Corporation

APPENDIX D — OPENING BRIEF OF DEFENDANT-APPELLANT NEW PRIME, INC.

No. 09-3489

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALLIANCE LOGISTICS, INC. n/k/a
ALLIANCE 3PL CORP.,

Plaintiff-Appellee,

v.

NEW PRIME, INC. d/b/a
PRIME INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 07 C 4944

Hon. Elaine E. Bucklo

OPENING BRIEF OF DEFENDANT-APPELLANT NEW PRIME, INC.

Appendix D

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Attorneys for Defendant-Appellant
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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **09-3489**

Short Caption: **Alliance Logistics. Inc. v. New Prime, Inc.**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes

in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use *N/A* for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED ..

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
New Prime, Inc. d/b/a Prime, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Mayer Brown LLP
Cassiday Schade LLP
Novoselsky Law Offices

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

New Prime, Inc. has no parent corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Jeffrey W. Sarles

Date: October 13, 2009

Attorney's Printed Name: Jeffrey W. Sarles

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes **X** No_.

Address: Mayer Brown LLP
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Appellate Court No: **09-3489**

Short Caption: **Alliance Logistics, Inc. v. New Prime, Inc.**

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Appendix D

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Katherine E. Agonis

Date: October 13, 2009

Attorney's Printed Name: Katherine E. Agonis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes _ No X.

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Appendix D

Appellate Court No: **09-3489**

Short Caption: **Alliance Logistics, Inc. v. New Prime, Inc.**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

New Prime, Inc. has no parent corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Kristin W. Silverman

Date: November 12, 2009

Attorney's Printed Name: Kristin W. Silverman

Appendix D

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes _ No **X**.

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TABLE OF CONTENTS

(OMITTED INTENTIONALLY)

TABLE OF CITED AUTHORITIES

(OMITTED INTENTIONALLY)

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff-appellee Alliance Logistics, Inc. ("Alliance") is an Illinois corporation with its principal place of business in Bolingbrook, Illinois. Defendant-appellant New Prime, Inc. ("Prime") is a Missouri corporation with its principal place of business in Springfield, Missouri. Alliance's complaint claimed damages of more than $2 million, well above the $75,000 jurisdictional amount.

On August 14, 2009, a jury returned a verdict in favor of Alliance on its breach of contract claim and awarded Alliance damages of $2,161,229.26. A1. The district court

entered final judgment the same day. A1-A2. On August 28, 2009, Prime moved for judgment as a matter of law under Fed. R. Civ. P. 50(b) and alternatively for a new trial under Rule 59(a). On October 5, 2009, the district court denied Prime's motions. A3.

On October 8, 2009, Prime timely filed a Notice of Appeal. R.164. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Prime was entitled to judgment as a matter of law where the meaning of disputed terms in the "back solicitation" clause of the parties' contract is unambiguous and the clear weight of the evidence establishes that Prime did not solicit Alliance's customer.

2. Whether Prime is entitled to a new trial because the district court plainly erred by failing to instruct the jury on the meaning of disputed contract terms or, insofar as the court deemed those terms ambiguous, on the jury's duty to weigh the evidence to construe such terms.

3. Whether Prime is entitled to a new trial because the district court improperly allowed Alliance's expert to explain the meaning of the back solicitation clause to the jury while improperly excluding testimony on that same subject from Prime's expert.

Appendix D

STATEMENT OF THE CASE

Alliance sued Prime on August 31, 2007. R.1. As relevant here, Alliance alleged that Prime, a trucking carrier, violated the back solicitation clause of its contract with Alliance, a company that matches shippers with carriers. According to Alliance, Prime violated that clause by soliciting the business of Loders Croklaan USA ("Loders"), a shipper under contract with Alliance for the provision of bulk transport services. Alliance also claimed that Prime tortiously interfered with Alliance's prospective business relations with Loders and with an existing contract with an Alliance employee. On March 9, 2009, the district court granted summary judgment to Prime on the interference with contract claim and denied summary judgment with respect to the other claims. *A14.*

The remaining claims were tried to a jury beginning on August 5, 2009. Prior to trial, the court granted Alliance's motion in limine to exclude the testimony of Prime's expert, Lana Batts, and denied Prime's motion in limine to exclude the testimony of Alliance's expert, Robert Walters. A11-A12. The court also denied Prime's motions for judgment as a matter of law, raised at the close of Alliance's case and again at the close of evidence. A5-A6, A9-A10. The jury returned a verdict in favor of Alliance on the breach-of-contract claim and in favor of Prime on the tortious-interference claim, awarding Alliance damages of $2,161,229.26. A1. Prime then renewed its motion for judgment as a matter of law and filed an alternative motion for a new trial. The district court denied both motions on October 5, 2009. A3. This appeal followed.

Appendix D

STATEMENT OF FACTS

A. The Parties

Prime is a family-owned nationwide trucking carrier founded in 1985 by Robert Low and based in Springfield, Missouri. Tr.III:3-4. Prime initially hauled primarily packaged and refrigerated goods, but it created a bulk tanker division in 2000. *Id.* at 7. In 2005, Prime began a rapid expansion of its bulk tanker business by assigning key personnel and devoting substantial resources to it. *Id.* at 9-10; Tr.II:185-86, 188; Tr.III:76-77.

Alliance is a third party logistics provider ("3PL"), sometimes referred to as a "freight forwarder" or "broker." Alliance was founded in 1997 by Dan Rimkus and is based in Bolingbrook, Illinois. Tr.I:123-25, 128-29. Alliance does not own any trucks or other equipment; instead it contracts with shippers to move their goods through carriers such as Prime. *Id.* at 125, 131-32; Tr.II:22-23.

B. Contracts And Relationships

In 1998, Prime began hauling loads for Loders, a leading manufacturer of fats and oils used in the food industry. Tr.III:165. Between 1998 and 2000, Prime carried 124 loads of dry and refrigerated goods from Loders' Channahon, Illinois, facility, mostly to a Pillsbury plant. *Id.* at 164-80, 183-85; IV:67. In addition, between 2000 and March 2003, Prime carried 13 bulk tanker loads to or from Loders, for which Prime directly invoiced

Loders. Tr.III:165-66; IV:52-53, 67-68, 91-92; V:14; VI:89. See R.181 [DX1, 2, 4, 9, 10, 11]. These shipments involved a short-term transactional contract between Loders and Prime known as a "rules page." R.181 [DX9E]; Tr.II:161-63; Tr. IV:68-69.

On April 19, 2000, Prime and Alliance entered into a Carrier-Shipper Transportation Agreement ("Agreement"), under which Prime would provide motor carrier transport for shippers upon Alliance's request. A15. The Agreement was drafted by Alliance (Tr.II:25; R.181 ¶ l[DX3]), states that it is governed by Illinois law (A17 ¶ 12), and contains an integration clause (*id.* ¶ 14) providing: "This document constitutes the entire agreement of the parties as to the subject matter hereof, supersedes any prior or contemporaneous oral or written agreements or understandings and may be amended only by a signed writing." The Agreement, in which Prime is designated the "Carrier" and Alliance the "Shipper," also contains a "back solicitation clause," stating:

> Carrier shall not solicit traffic from any shipper, consignee or customer of Shipper where Carrier first knew of the availability of such traffic as a result of Shipper's efforts or the traffic of Shipper, consignee or customer of the Shipper was first tendered to Carrier by Shipper.

Id. ¶ 11.

Alliance initially used Prime infrequently because of the small size and limited capacity of Prime's bulk

tanker division. Tr.I:166-67; Tr.II:91. But Alliance made increasing use of Prime after Prime's bulk tanker division expanded in 2005. Tr.I:67; Tr.II:98-99, 194-95.

In March 2003, Loders and Alliance executed a contract under which Alliance would arrange for carriers to transport Loders' products from its Channohon, Illinois plant. Tr.I:136-37; R.181 [DX7]. The Alliance-Loders contract provided for termination without cause on 120 days' notice. Tr.I:138; R.181 [DX 7 at ¶ 8].

Loders' supply chain manager, Marcel Henneman, and his successor, Karl Mueller, were primarily responsible for overseeing the Alliance contract. Tr.I:143, 148-52. When Henneman took over as Loders' supply chain director in 2004, he informed Dan Rimkus of Alliance that Loders' shipping needs would soon explode due to its development of a new product that was in high demand. *Id.* at 143. Loders was concerned that Alliance, a relatively small operation, would not be able to handle the increased capacity. *Id.* at 144; Tr.II:33-34. Therefore Alliance considered it "perfect" timing that Prime was revamping its bulk tanker division in time for Alliance to meet the demand. Tr.I:170. Rimkus told Prime that the "huge growth" that Loders was expecting in 2005 would provide Prime with an opportunity to increase its loads with Alliance if Prime was willing to invest in new equipment. *Id.* at 170-71.

Loders' shipments began to increase in 2004 and became a "major push" in 2005, stabilizing in mid to late 2006. *Id.* at 145. During this time, Alliance increasingly

relied on Prime to service Loders. *Id.* at 172-174; Tr.III:205.

C. 2005 Meetings

In October 2005, Alliance arranged meetings between Loders and three of Alliance's "core base" carriers, including Prime. Tr.I:175-76. Loders' Henneman had requested the meetings because he wanted to "combat" a driver shortage" in light of Loders' "huge growth" and to express directly to the carriers his concerns about service and truck availability. *Id.* at 176, 179. Henneman also wanted to have a carrier build a tank wash (which cleans the interior of a tanker trailer before it is loaded with product, Tr.III:116-17) onsite at Loders' facility—a proposal that Alliance did not support. Tr.II:36-37. Representatives from Prime met with Loders at Loders' facility on October 11, 2005. Tr.I:178-79. At this meeting—with Alliance's Dan Rimkus present—Prime expressed interest in building the tank wash for Loders and increasing the loads it hauled for Loders. Tr.II:207-08.

Loders had already begun to evaluate its transportation options and review its contract with Alliance. Tr.V:81; Tr.IV:98-99. With the final year of that contract approaching, Loders began "to review whether we wanted to continue the contract," and Henneman thought it prudent to assess other options "for comparative purposes." Tr.IV:98. Loders was concerned that "after early 2005 Alliance's service level dropped," particularly with respect to "on-time delivery," and had not improved. Tr.V:80-81. AB part of its evaluation process, Loders

considered bringing logistics management in-house and obtaining carriers itself. *Id.* at 99, 101. Loders decided to solicit information from "several carriers," including Prime. *Id.* at 108-09.

On November 15, 2005, Henneman and his then-superior, Chee Kuan Wong, attended a meeting at Prime's corporate office in Springfield. Tr.II:240; Tr.IV:101. Henneman told Alliance's Rimkus about the meeting, and Rimkus decided to attend as well. *Id.*; Tr.I:181-82. In Henneman's view, the "primary goal" of this meeting was to discuss the tank wash proposal, and a secondary purpose was "to basically meet and greet and discuss ongoing business." Tr.IV:101-02. According to Wong (and unbeknownst to Alliance or Prime), Loders also wanted to determine if it should have Prime "bid to be the new 3PL for the Loders facility to replace Alliance." Tr.V:82. Rimkus was upset that Prime had invited Loders to visit Prime directly instead of going through him, and he wanted to "work on replacing them as a carrier," but Henneman advised against doing so. Tr.I:182.

The November 15 meeting began with a tour of Prime's facility, and the various representatives then met in a conference room. Tr.I:184-86. During much of that meeting, Rimkus met separately with a credit manager and Prime's chief financial officer. *Id.* at 186-89. Prime and Loders discussed the tank wash and the possibility of having Prime dedicate more of its trucks to Loders. Tr.IV:103. Henneman told Prime that "Loders was considering putting its transportation business contract out to bid or would be possibly making a change at the

conclusion of the contract between Loders and Alliance." *Id.*; Tr.III:187. According to Henneman, Prime did not discuss Prime's replacing Alliance as Loders' logistics provider. Tr.IV:110. Rather, Loders made an "informal request" for information from Prime about whether it could manage Loders' transportation needs and at what cost. *Id.* at 104. Henneman said that he "solicited Prime on behalf of Loders rather than Prime's representatives soliciting [him]." *Id.*

When Rimkus returned to the Loders meeting from his conversation with Prime's CFO, he was asked not to enter the room yet, because the Loders officers were discussing a "credit limit issue" that Loders believed was affecting the number of trucks that Prime was making available for Loders loads. Tr.IV:110; *id.* at 105-07. Loders did not tell Alliance that it was surveying the marketplace for other transportation options until several months later, in January or February of 2006, and even then did not specifically tell Alliance that it had informally asked Prime to bid on Loders' transportation contract. *Id.* at 108-09.

D. Prime's Response To Loders' Solicitation

After the November 15 meeting, Rimkus refused to take any telephone calls from Prime. He suspected that Loders intended to work directly with Prime and wanted to end Alliance's relationship with Prime altogether. Tr.I:191; Tr.IV:111. However, Loders again requested that Alliance continue to use Prime, because, in Henneman's view, "it was not a good suggestion to stop working with Prime." Tr.I:191-92; Tr.IV:111. Although Alliance could

not meet Loders' heavy demand without using Prime as a carrier (Tr.II:103), Rimkus told his employees to "lean down the amount of loads" given to Prime. Tr.I:192.

Loders continued to communicate with Prime "to investigate the market opportunities on logistics" and to seek "[i]nformal information on rates." Tr.IV:111-12. In Henneman's view, "[i]t's always good to compare when you go into a new contract phase to make sure you get the best deals on quality, performance, and price." *Id.* at 98. Henneman believed that Loders had been "a totally different business" when it initially hired Alliance and before its expansion, noting that Loders had concerns about Alliance's "ability to gain the market share needed for our business." *Id.* at 114. Thus, according to Henneman, "we were looking for market information and seeing whether a deal with Alliance was something that we wanted to renew or end." *Id.* at 112.

Loders therefore asked Prime, as well as other carriers, for more detailed information about "price and service, specifically for bulk deliveries." Tr.IV:111-13. Prime, which was "interested in the business of Loders" (Tr.II:241-42), provided the requested information. Tr.III:122-23. Loders also asked to meet with Prime to discuss a "long term relationship." *Id.* at 82-83; Tr.III at 208. Prime responded enthusiastically to Loders' inquiries, believing that Loders would be a beneficial long-term partner. *Id.* at 39, 45, 91-92, 208-09; Tr.II:219. Prime had carried loads for Loders before and always preferred to work directly with a shipper instead of using a 3PL middleman. Tr.III:33- 37; Tr.II:201-02.

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Karl Mueller replaced Henneman as Loders' supply chain director in June 2006. According to his customer service manager, Milena Green, Alliance was continuing to fail "Loders' expectations regarding on-time pickup and on-time delivery," and Loders' customers were complaining. Tr.V:155-56. Mueller therefore continued to explore other transportation options for Loders, including conducting "a bidding process" and holding meetings with Prime. *Id.* at 101-03, 112-13, 129-32.

Loders researched various vendors through their websites and contacted some for quotes. Tr.V:129, 157-60. Loders asked eight to ten firms to submit information and requested more detailed assessments from a few of them. *Id.* at 159. Green sent an email to Prime in April 2007 inquiring about rates to transport Loders' goods, to which Prime responded positively. R.181 [DX8]; Tr.V:34, 50, 160. Low, Prime's CEO, understood that "Loders was looking for a proposal on how Prime would handle all of its transportation needs," and Prime "responded to their solicitation" and was "bidding along with other carriers and brokers." Tr.III:30, 39. Prime, like the other carriers, said that it "wanted to do business with Loders" and sought to show that it "was capable of handling Loders' business" directly. *Id.* at 45, 90. Prime and Loders held meetings in early 2007 at which, according to Low, Loders "asked us if we could do that" and Prime "responded that, yes, we'd like to do that." *Id.* at 45. The other carriers receiving bids from Loders made similar presentations and, according to Mueller, also "were eager to have [Loders'] business." Tr.V:103.

In June 2007, Loders' Mueller decided not to renew Alliance's contract because Alliance "was not performing the way we wanted them to perform" and Loders was not "satisfied with [Alliance's] service." Tr.V:89-90, 116-17. Green agreed with that decision due to Alliance's "poor performance at the service levels and the risk of losing customers." Id. at 157. Loders notified Alliance of its termination in June. R.181 [DX6]. But Loders honored its contract with Alliance through the October 2007 termination date, thereafter using Prime to handle its bulk loads and another carrier, C.H. Robinson, to handle its other loads. Tr.V:118. According to Mueller, Prime "had nothing to do with" his decision to terminate Alliance, which was "independent of Prime and C.H. Robinson." *Id.* at 104, 149-50.

E. District Court Proceedings

On August 31, 2007, Alliance filed suit against Prime, alleging that Prime breached the Agreement's back solicitation clause by accepting business directly from Loders. R.1 at 9-10. Prime denied that it breached that clause, contending that it did not solicit Loders, which in fact solicited Prime, and that in any event it did not first learn of the availability of Loders' traffic through Alliance's efforts.

The district court denied Prime's motion for summary judgment on Alliance's breach of contract claim by minute order dated March 9, 2009, which states in full: "'There are questions of fact as to whether defendant's actions amounted to solicitation of Loder's business in violation

of the back solicitation clause of the contract between plaintiff and defendant." A14.

1. Disputes over "solicit" and "traffic"

At trial, the parties' disputes focused on the meaning of two terms in the Agreement's back solicitation clause. 'The fact witnesses were all current or former employees of Alliance, Prime, and Loders, namely:

> Alliance: Dan Rimkus, owner and CEO; and Cheryl Hanek, carrier relations manager and Rimkus' sister.
>
> Prime: Robert Low, owner and CEO; Kirk Erickson, first bulk tanker division director; Jimmy Wilkins, bulk tanker division director beginning 2005; Lance Cain, bulk tanker division sales representative; Darryl Hopkins, bulk tanker division traffic manager; Paul McAnaw, sales and marketing representative; Brent Olson, onsite scheduler (employed by Loders until July 2004 and by Alliance from July 2004 to September 2007); Clarence Wutke, vice-president of sales; Steven Crawford, general counsel; and Richard Hoedl, director of finance.
>
> Loders: Alex Decker, signatory on contract with Alliance; Marcel Henneman, supply chain division director beginning in 2004 (now supply chain manager at Cargill); Chee Kuan Wong,

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Henneman's superior at Loders (now stationed in the Netherlands); Karl Mueller, supply chain division director beginning June 2006; and Milena Green, Loder's customer service team lead (now works for Kraft).

Alliance contended that the "shall not solicit" term barred Prime from responding favorably to Loders' solicitation and required Prime to notify Alliance upon receiving a solicitation from Loders. Tr.II:56-60; Tr.V:62; Tr.VI:70-71. According to Alliance's Rimkus, the "solicitation" proscribed by the back solicitation clause comprised "[*a*]*ny* conversation regarding pricing, charges, rates *** without the knowledge of Alliance." Tr.II:7071 (emphasis added). In Prime's view, by contrast, the "shall not solicit" term did not bar it from responding to solicitations from shippers. Tr.III:30, 39-40. There was little or no dispute as to the timing or nature of the communications between Loders and Prime. Instead, the parties' witnesses disputed how to characterize those communications, *i.e.*, whether they constituted an improper "solicitation," based on their respective constructions of the Agreement's "shall not solicit" term.

The parties also disputed what constituted the "traffic" that, to breach the back solicitation clause, Prime had to "first kn[o]w of" as a result of Alliance's efforts or had to have been "first tendered" to Prime by Alliance. See A17 ¶ 11. The parties mutually agreed that there was no negotiation over that term before the Agreement was executed. Tr.IV:13. Alliance contended that "traffic" means "the same thing" as "logistics" and must be bulk

tanker traffic and quantitatively substantial. Tr.II:49, 81-82; Tr.VI:45, 48. Prime contended, in contrast, that the Agreement places no such limits on the meaning of "traffic," the plain meaning of which is the carriage of loads from one place to another. Tr.III:218. There was no dispute over the underlying facts that Prime had carried 124 loads of packaged goods and 13 bulk tanker loads for Loders *before* Alliance had arranged for Prime to carry any loads for Loders. Tr.II:149; Tr. III:165; Tr.IV:50-52, 67-68, 93-94; Tr.V:14. The parties instead disputed whether to characterize Prime's prior loads for Loders as "traffic."

Neutral third-party witnesses from Loders testified about the process that led to its decision not to renew the Alliance contract and to seek to have Prime provide bulk transport directly. See pp. 7-10, *supra.* Marcel Henneman testified that in 2005-06 there was no "active solicitation of Loders' business" from Prime. Tr.IV:113. He said that Loders was "actively looking at what market opportunities we would have going forward" (*id.*) and that he "solicited Prime on behalf of Loders rather than Prime's representative soliciting [him]." *Id.* at 104. Karl Mueller testified that Loders initiated a bidding process to replace Alliance and that Prime and other bidders were merely "responding to [Loders'] bid solicitation." Tr.V:101-102. As he put it, Prime solicited only if being "interested in our business" qualified as solicitation. Tr.V:112. He could not comprehend how, after "[w]e approached several 3PLs and asked them to bid into our business," their "responses" could be deemed solicitation. *Id.* at 110. Finally, Milena Green testified that Loders "initiate[d] the process of

replacing Alliance," that it "sought out other logistics providers," and that it "solicit[ed] bids from more than one bulk carrier." Tr.V:158-59.

2. Expert rulings and testimony

Both Alliance and Prime engaged expert witnesses who prepared reports about the use and significance of back solicitation clauses. R.76 Ex. A; R.82 Ex. A.

On July 13, 2009, the court granted Alliance's motion in limine to exclude the testimony of Prime's expert, Lana Batts, stating in a minute order:

> Ms. Batts opines that defendant did not violate the back solicitation clause. This is what the jury will decide based on the evidence and my instructions on the applicable law. Ms. Batts' opinion simply recites what she says are the facts. She does not refer to industry knowledge, custom or practice or otherwise provide any expert knowledge that would assist the jury in interpreting either the clause or the facts. She also opines that defendant did not solicit Loders' business, was simply 'exercising good fiscal control when it questioned Alliance's pay policies' and did not undermine plaintiff's services ***. Again she offers no expert knowledge that would assist the jury in its deliberations, simply summarizing defendant's arguments as to what it says are the facts. Fed. R. Evid. 702 permits testimony by experts

> 'if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' None of Ms. Batts' proposed testimony meets this threshold requirement.

A11.

On August 3, 2009, the court denied Prime's motion to reconsider the exclusion of Batts' expert testimony, stating in another minute order:

> I am unable to find anything in either the report or the deposition that touches on her expertise, whether by education or experience, to testify to the custom in the industry regarding any aspect of back solicitation clauses. While her resume is impressive, neither it nor her deposition in which she discusses her responsibilities in her various positions, indicates that she has any basis for knowing what industry practice would be with respect to back solicitation clauses.

A13.

The court did authorize an offer of proof at the close of evidence. Batts then testified, consistent with her report, that she has served as President of the Truckload Carriers Association; President of the Professional Truck Driver Institute and the Truckload Academy; President and CEO of the American Financial Services Association; Transportation Economist of the American

Trucking Association; and Executive Vice-President and Chief Development Officer of Transport Network, an e-commerce business that helps optimize loads within the trucking industry. Tr.V:180-82. Batts also has worked with the Transportation Intermediaries Association, a trade association for "brokers" like Alliance. *Id.* at 180-81. She currently runs consulting firms for the trucking industry. *Id.* at 179. Batts has authored articles on the trucking industry, been quoted in trucking industry trade publications, and given speeches to trucking industry groups. *Id.* at 183. She testified that she was familiar with back solicitation clauses and their purpose, explaining that "back solicitation clauses are always a part of the discussions that come up" in her work with both her carrier and broker clients. *Id.* at 184. On cross-examination, she testified that she had represented a broker in negotiations with a carrier that broke down when the broker accused the carrier of trying to back-solicit the carrier's customers. *Id.* at 189-90.

Nevertheless, the court again refused to allow Batts to testify. During the offer of proof, the court stopped Batts from stating her opinion on the purpose of back solicitation clauses, saying that the only purpose of the offer of proof was to determine whether she was qualified to testify. Tr.V:184-87. The court concluded: "I'm sure there are many things that she could testify about, but *** my ruling is the same. If I'm wrong, I'm wrong if it ever gets to that." *Id.* at 193.

In contrast, the court denied in large part Prime's motion in limine to exclude the testimony of Robert

Walters, Alliance's expert. The court ruled that Walters, who owns a 3PL brokerage business (R.76 Ex. A at 11; Tr.IV:22-23), "may testify to the purpose of a back solicitation clause, how they are used in the industry, and the custom in the industry to carve out customers from back solicitation clauses." A12.

At trial, Walters testified that that the purpose of back solicitation clauses is to protect the broker from carrier communications to the shipper no matter whether they are "deliberately or innocently done"; the largest carriers expressly list existing customers in the clause to make clear that the no-solicitation obligation does not apply to those customers; and the "normal practice," when an existing customer of both the broker and carrier tenders a load to the carrier, is for the carrier to notify the broker that this was "a preexisting account." Tr.IV:36-38.

As a result, the jury heard the opinion of Walters, Alliance's expert, but did not hear the opinion of Batts, Prime's expert.

3. Alliance's closing argument

In closing argument, Alliance's counsel recognized that the meaning of "shall not solicit" in the Agreement's back solicitation clause is clear: "You don't solicit the customer whose traffic you first became aware of as a result of our efforts." Tr.VI:66-67. But he then broadened the plain meaning of "solicit" to encompass responding to someone else's overture: "[T]he contract doesn't say you can solicit our customers if they make an overture to you [or] if they ask you for a bid." *Id.* at 70-71.

Alliance's counsel also recognized that the meaning of "traffic" is clear: "Traffic is the transportation of goods from one point to another, and everyone in the transportation business is involved in traffic." Tr.VI:68. But he then backtracked from that recognition, telling the jury that traffic "is the bulk tanker business." *Id.* He also told the jury that "traffic" means "substantial bulk tanker business" and that the 13 bulk tanker loads carried by Prime for Loders prior to the Prime-Alliance contract were "de minimis" and "so small" that no one could "argue that this was knowledge of traffic from Loders." *Id.* at 45, 48.

Alliance's counsel also told the jury that the carrier has an "out" from the no-solicitation mandate only if the carrier notifies the broker that it was already doing business with the customer. Unable to point to any contract language supporting that interpretation, he instead argued that Alliance's expert "Mr. Walters testified to it." *Id.* at 71. He summarized Walters' expert testimony as follows: "If you want to exclude a customer from back solicitation clause [*sic*], you tell the 3PL about the existence of that customer. You either do it at the time the contract is formed or when you get a load with a customer that you think is excluded from a back solicitation clause." Tr.VI:47-48. He further emphasized to the jury in his rebuttal closing that Walters' testimony was the ***only*** expert testimony on the meaning of the back solicitation clause: "You heard an expert witness in this case whose testimony is ***unrebutted*** that if you want to take on business from somebody you consider a significant customer, or not a significant customer, a customer, that

doesn't violate the back solicitation clause, you declare it when you get the load." *Id.* at 106 (emphasis added). He thereby told the jury that the Agreement contained unstated obligations based on the only expert testimony that the court allowed the jury to hear.

4. **Jury instructions**

In discussing proposed jury instructions with the parties' counsel, the district judge indicated that she viewed the meaning of "solicit" to be unambiguous and the meaning of "traffic" to be ambiguous. As for "traffic," she found it "not unambiguous" and said the jury "ha[d] to decide" whether it means "all traffic no matter what [or] how little" or the "particular bulk tanker business" that Prime got through Alliance, as well as whether Prime's 13 bulk tanker trips were "sufficient." Tr.IV:14, 131-32. "I don't know what that contract meant. That's what the jury is going to have to decide." *Id.* at 132. She also indicated that the role of the jury was to decide whether Prime solicited Loders and whether Prime "first knew of" Loders' traffic as a result of Alliance's efforts or tender. See Tr.V:202 ("Did they solicit, and what is meant by 'traffic'? I think that's what it's going to tum on.").

However, the court did not so instruct the jury. Instead, its only instruction on the breach of contract issue stated in full:

> The parties do not dispute that they entered into a valid and enforceable contract. Generally, if a party fails to perform its obligation

> according to the terms of the contract, the party has breached the contract. **You must decide whether New Prime failed to do what it was required to do under the contract.** Alliance claims New Prime breached a contract between them. The relevant provision of the contract is as follows: "Carrier [New Prime] shall not solicit traffic from any shipper, consignee or customer of Shipper [Alliance] where Carrier [New Prime] first knew of the availability of such traffic as a result of Shipper's [Alliance's] efforts or the traffic of Shipper [Alliance], consignee or customer of the Shipper [Alliance] was first tendered to Carrier [New Prime] by Shipper [Alliance]." As to Count I, Alliance has the burden of proving New Prime breached the contract in the following way: "by soliciting the traffic from Loders where Prime first knew the availability of such traffic as a result of Alliance's efforts of the traffic of Loders was first tendered to Prime by Alliance." New Prime denies that it breached the contract.[1]

A37; Tr.VI:117-18. Only the very general highlighted sentence told the jury what it was supposed to do, and it said nothing about the meaning of "solicit" or "traffic"

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1. The court's oral jury instruction deviated a bit from the written version. Whereas the written instruction says Alliance has the burden of proving Prime breached the contract "by soliciting the *traffic* from Loders" (emphasis added), the court's oral instruction said "by soliciting the *transaction* from Loders" (emphasis added). Compare Tr.VI:118 with A37.

or the jury's duty to weigh the evidence to resolve any ambiguities about the meaning of those terms and then to determine whether Prime solicited Loders as barred by the back solicitation clause.

5. Verdict and judgment

Prime moved for judgment as a matter of law at the end of plaintiff's case. Tr.V:55. The district judge denied that motion, in part because she believed that it was up to the jury to come up with "a reasonable interpretation" of the back solicitation clause, in particular with respect to whether the referenced "traffic" had to be "huge" or not. A5-A6. Prime also moved for judgment as a matter of law at the close of evidence. Tr.VI:37. During argument on that motion, the court stated that "I think it's close" and suggested that the only way Alliance could win was by proving that Loders witnesses Mueller and Green "were both completely lying." A9-A10. However, the court concluded: "I'm not going to decide this. It's going to go to the jury, and we'll see." A10.

The jury found in favor of Alliance on the breach of contract claim, awarding it damages of $2,161,229.26, and the district court entered judgment on that award. A1- A2; Tr.VIII:5-7.

After trial, Prime renewed its motion for a judgment as a matter of law, arguing that the disputed contract terms were clear and unambiguous and that the clear weight of the evidence showed that Loders solicited Prime, not vice versa, and that in any event Prime knew of Loders' traffic independently of Alliance. R.137 at 2-5. Alternatively,

Prime requested a new trial, arguing *inter alia* that the court's rulings on the parties' experts effectively allowed Alliance's expert to unilaterally instruct the jury on the meaning of the Agreement, an error compounded by the court's own failure to instruct the jury on the meaning of the disputed contract terms or on the jury's duty to resolve the parties' disputes over the meaning and application of those terms. *Id.* at 8-13. The court denied Prime's post-trial motions by minute order, stating: "I have considered the issues raised by defendant's motion and find them to be without merit." R.159.

SUMMARY OF THE ARGUMENT

I.

Alliance's breach of contract claim never should have been submitted to the jury. The meaning of the two disputed contract terms—"solicit" and "traffic"—is clear and unambiguous, as the district court should have ruled as a matter of law. The undisputed evidence established that Loders approached Prime about carrying its loads and that Prime simply responded to Loders' overtures. Such a response is not a solicitation under the plain meaning of that term. The undisputed evidence further established that Prime knew of Loders' traffic independently of Alliance, indeed that Prime had hauled dozens of loads for Loders, including 13 bulk tanker loads, well before Loders ever hired Alliance. The district court should have applied the plain meaning of the back solicitation clause to these undisputed facts and entered judgment as a matter of law in favor of Prime.

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II.

Alternatively, Prime is entitled to a new trial on Alliance's breach of contract claim.

First, the district court's jury instruction on breach of contract was woefully inadequate to apprise the jury of its task. If the court found the disputed terms unambiguous, it should have instructed the jury as to their meaning. Or if the court found them ambiguous, it should have instructed the jury as to its duty to weigh the evidence and determine their meaning. Instead, the instruction simply parroted the contractual language and told the jury to "decide whether New Prime failed to do what it was required to do under the contract." That instruction did not provide the jury with the guidance required under Illinois law and this Court's precedents and deprived Prime of a fair trial. It therefore was plainly erroneous, entitling Prime to a new trial.

Second, apart from the improper jury instruction, the district court erroneously delegated to Alliance's expert the task of explaining to the jury the meaning of the back solicitation clause. The court, not an expert, must explain the law to the jury. Yet, Alliance's expert was permitted to tell the jury that the back solicitation clause means something other than what it says. The prejudicial impact of this improper testimony was compounded by the court's refusal to allow countervailing testimony from Prime's expert. As a result, the jury, which heard nothing from the court on the meaning of the Agreement, heard expert testimony on that subject from one side only—a fact

emphasized by Alliance's attorney at closing argument to sway the jury. This one-sided, unfair, and prejudicial process further entitles Prime to a new trial.

ARGUMENT

Standard of Review. The denial of a motion for judgment as a matter of law under FED.R.CIV.P. 50(b) is reviewed de *novo. Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528,531 (7th Cir. 2008). The denial of a motion for a new trial under FED. R. CIV. P. 59(a) is reviewed for abuse of discretion. *Deicher v. City of Evansville,* 545 F.3d 537, 541 (7th Cir. 2008).

I. PRIME IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALLIANCE'S BREACH OF CONTRACT CLAIMS.

Alliance's breach of contract claim hinges on whether Prime "solicited" business from Loders, and if so, whether that business was "traffic" made available to Prime by Alliance's "efforts" or "first tendered" to Prime by Alliance. Neither of the disputed terms—"solicit" or "traffic"—is ambiguous. Accordingly, the district court should have "declare[d] the meaning of those provisions" rather than submitted that issue to the jury. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). The evidence, in particular the unrefuted testimony of Loders' disinterested witnesses, established that Prime did not "solicit" Loders' traffic. Moreover, even if Prime had solicited Loders' traffic, the unrebutted evidence established that Prime had carried traffic, including

bulk transport, for Loders long before Loders became a customer of Alliance. Accordingly, Prime was entitled to judgment as a matter of law on Alliance's breach of contract claim.

A. The Disputed Terms Of The Back Solicitation Clause Are Clear And Unambiguous.

Under Illinois law, "contracts are interpreted according to the 'four corners' rule": a contract "must be presumed to speak the intention of the parties," and contract terms are given their "plain meaning unless otherwise defined." *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992-93 (7th Cir. 2007); accord *Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 747 (7th Cir. 2008). A contract is "clear on its face" if "an ordinary reader of English" would find it so. *AM Int'l, Inc. v. Graphic Mgmt. Assocs.*, 44 F.3d 572, 574, 577 (7th Cir. 1995) (plaintiff "presented no objective evidence that the contract means something different from what it seems to mean").

Contracts are not "rendered ambiguous simply because the parties do not agree on the meaning of its terms." *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998). A contract term is ambiguous only if "it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E.2d 760, 769 (Ill. App. Ct. 2005). "If a judge can make sense of a written contract without hearing testimony, his duty is to

construe the contract without letting the parties introduce any evidence other than the contract itself." *LaSalle Nat'l Bank v. General Mills Restaurant Group*, 854 F.2d 1050, 1052 (7th Cir. 1988). Although intermediate appellate courts in Illinois have admitted extrinsic evidence to help determine whether otherwise clear contract language conceals a latent ambiguity, the Illinois Supreme Court has rejected such an approach where, as here, the contract contains an integration clause. *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 885 (Ill. 1999); see A17 ¶ 14. More generally, "a court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented." *Gallagher v. Lenart*, 854 N.E.2d 800, 807 (Ill. App. Ct. 2006).

Applying these principles, the disputed contract term "solicit" is clear and unambiguous. "Solicit" means "approach with a request or plea." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2169 (Merriam-Webster 2002); see *Supreme Laundry Serv., L.L.C.*, 521 F.3d at 747 (Illinois courts look to the "dictionary definition" of contract terms). Applying that plain meaning to the back solicitation clause, Prime was barred from approaching Loders to request that it carry certain traffic for Loders. Alliance's attempt to broaden the meaning of "solicit" to comprise "***any*** conversation regarding pricing, charges, rates *** without the knowledge of Alliance" (Tr. II:71, emphasis added) has no support in the Agreement, the dictionary, or common usage. In fact, it would conflict with the term's plain meaning by deeming an approach by

Alliance's ***customer***, in this case Loders, to be a solicitation by Prime.[2]

Equally insupportable is Alliance's contention that "no solicitation" includes an affirmative obligation on the part of Prime to notify Alliance if a customer of Alliance requested price information and to list in the Agreement all shippers with which Prime previously had done business. Tr.II: 58-60, 70-71. Nothing in the Agreement, or in the dictionary or common usage, associates such a notice obligation with the bar on solicitation. Indeed, Alliance's CEO Dan Rimkus admitted that the Agreement does not require Prime to identify customers with which it previously had done business. *Id.* at 57-58. And Alliance's view is rendered even less plausible by Rimkus' contention that the notice obligation applied with respect to Loders but "not anyone else." *Id.* at 60.

The other disputed contract term, "traffic," is also clear and unambiguous. On the witness stand, Alliance's Rimkus defined it according to its "commonly understood meaning" as "things being transported to and from along a route." Tr.II:49. The dictionary confirms that "traffic" is "the vehicles or pedestrians moving along a route" or "the passengers or cargo carried by a transportation system." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* p. 23, at 2423. Applying that plain

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2. Even Alliance's expert unequivocally testified that back solicitation clauses protect against "direct communication *** ***from the carrier to the shipper*** that will seek to exclude the broker from his commissions and his revenue." Tr.IV:36 (emphasis added). He thereby recognized that communications initiated by the shipper are not proscribed.

meaning, Prime was barred from soliciting Loders to carry Loders' cargo on Prime's trucks (if Prime first learned of Loders' traffic through Alliance). Alliance's attempt to limit the meaning of "traffic" to "logistics work" involving a large (but unspecified) number of loads carried in bulk tankers pursuant to a long-term contract (*e.g.*, Tr. 11:49, 81-82; Tr.VI:45-6, 48, 68) has no support in the Agreement, the dictionary, or common usage.

In short, there is nothing mysterious about the meaning of "solicit" or "traffic" in the Agreement's back solicitation clause. Alliance's attempts to broaden the meaning of "solicit" and narrow the meaning of "traffic" are simply arguments of an interested party. But pure argument cannot "create an ambiguity in the contract language where no ambiguity exists." *Bechtold v. Physicians Health Plan*, 19 F.3d 322, 326 (7th Cir. 1994). The court should have construed the clear and unambiguous language of the back solicitation clause as a matter of law. See *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 370 (Ill. 1998); *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 664 (7th Cir. 2008) (applying Illinois law) ("The interpretation of an unambiguous contract is a question of law for the court"); *Bechtold*, 19 F.3d at 325 (same). Juries simply have no role to play in resolving disputes over unambiguous contract terms. *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316-17 (7th Cir. 1988) ("If the contract was unambiguous, the jury should not have been given the task of interpreting it").[3]

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3. Moreover, Alliance drafted the disputed language. Tr.II:25. To the extent there can be any doubt over the meaning of the terms here, "any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision." *Dowd & Dowd, Ltd.*, 693 N.E.2d at 368.

B. The Pertinent Facts Are Undisputed.

Not only are the disputed contract terms unambiguous, but the facts relevant to the alleged breach are undisputed. First, unrebutted evidence established that Loders initially approached Prime about carrying loads for Loders directly and that Prime simply responded positively to Loders' solicitation. See pp. 7-10, *supra*. Second, unrebutted evidence established that Prime carried more than 130 loads for Loders, including 13 bulk tanker loads, before Loders became Alliance's customer, refuting Alliance's contention that Prime learned of Loders' traffic through Alliance. See pp. 4, 12-13, *supra*.

None of Alliance's witnesses claimed to have observed any solicitation of Loders by Prime. The only witnesses with first-hand knowledge were from Prime and Loders. The Loders witnesses uniformly testified that the initiative came from Loders. Henneman recalled that "it would have been [him] that solicited Prime on behalf of Loders rather than Prime's representatives soliciting [him]." Tr.IV:104. He explained that Loders was "actively looking at what market opportunities we would have going forward." *Id.* at 113. He did not "consider Prime's conduct toward Loders in 2005 and 2006 an active solicitation of Loders' business." *Id.* Wong testified that at the November 2005 meeting, Loders wanted "to determine if *** Loders wanted Prime to bid to be the new 3PL for the Loders facility to replace Alliance." Tr.V:82. Mueller testified that Loders held a bidding process to replace Alliance and that Prime and other bidders were "responding to [Loders'] solicitation." *Id.* at 101-102. He did not view Prime's

response as soliciting unless "soliciting" means that Prime was "interested in our business." *Id.* at 112. Green added that Loders "initiate[d] the process of replacing Alliance," that it "sought out other logistics providers," and that it "solicit[ed] bids from more than one bulk carrier." *Id.* at 158-59.

The testimony of Prime's witnesses confirmed that of the Loders witnesses. For example, Prime's CEO testified that Prime "had been asked by Loders to bid on their business" and that Prime "responded to their solicitation" and "bid on the business." Tr.III:30, 124. He explained that Prime believed it could and should "go after" business tendered by Loders. *Id.* at 39, 84, 208-09. Prime's response was admittedly enthusiastic, as it believed that Loders would be a beneficial long-term partner. *Id.* at 39, 45, 91-92, 208-09; Tr.II:219.

Even if the testimony of Prime's witnesses were discounted as self-serving, the Loders witnesses were disinterested. See *Salus v. GTE Directories Servo Corp.*, 104 F.3d 131, 136 (7th Cir. 1997) (testimony of disinterested witnesses entitled to more weight). Indeed, key Loders witnesses Henneman and Green are now employed elsewhere and thus have no stake in the Loders-Prime relationship. They testified without qualification that Loders solicited Prime for information and ultimately to replace Alliance.

With respect to Prime's knowledge of the Loders traffic, the unrebutted evidence showed that Prime hauled loads for Loders as far back as 1998-long before Loders

had a contract with Alliance. Between 1998 and 2003, Prime hauled 124 loads to or from Loders, and at least 13 of those loads were carried by Prime's bulk tankers. Tr.III:164-80, 183-85; TrII:161-62; TrIV:50-52, 67-68, 91-92; Tr.V:13-14; R.181 [DX1, 2, 4, 9-11]. Loders confirmed that its records show that before 2003, "Prime did in fact do certain work related to transportation at the request of Loders." Tr.IV:93. And a former Loders employee testified that as of May 2001, Prime was on a list of carriers whom "Loders would work with to haul their traffic." *Id.* at 50.

Unable to refute this evidence, Alliance attempted to amend the contract through argument and assertion. Alliance argued that the preexisting loads were not "traffic" because they were "de minimis" or did not originate at Loders or were not carried with particular equipment. Yet, when pressed, Alliance's CEO had to admit that no such limitations appear in the Agreement. Tr.II:57. Thus, Alliance offered no factual rebuttal, testimonial or documentary, to refute the abundant evidence that Prime knew of Loders' traffic independently, not through Alliance.

This unrefuted evidence was sufficient to prove as a matter of law that Prime did not breach the Agreement's back solicitation clause. Furthermore, Loders' Mueller unequivocally testified that his decision not to renew Alliance's contract "had nothing to do with" any conduct by Prime and that Prime did not cause Alliance's termination. Tr.V:104. Instead, he made that decision because Alliance "was not performing the way we wanted them to perform." *Id.* at 90. And Alliance offered no evidence that it would

have retained the Loders business but for Prime's alleged solicitation.

In sum, the district court should have construed the disputed but unambiguous contract terms according to their plain meaning, applied them to the unrebutted facts, and concluded that Prime did not breach the Agreement as a matter of law.

II. PRIME IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS ON COUNT I WERE PLAINLY ERRONEOUS.

Alternatively, Prime is entitled to a new trial because the jury instruction on Alliance's breach of contract claim was fundamentally defective. The district court failed to instruct the jury on the meaning of the disputed contract terms or, if the court deemed them ambiguous, on the jury's duty to resolve the extrinsic evidence as to their meaning. Prime recognizes that, because it did not object to that instruction at trial, it is subject to review only for plain error. FED.R.CIV.P. 51(d)(2); *Higbee v. Sentry Ins. Co.*, 440 F.3d 408, 409 (7th Cir. 2006) (change to Federal Rules allowing review for plain error abrogated this Court's cases predating December 2003). Reversals for plain error "have become more numerous in recent years." 9C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2558 (3d ed. 2008). This case meets the plain error standard because there was an obvious error that affected Prime's substantial rights by preventing a fair trial on the breach of contract count. See *Ammons-Lewis v. Metro. Water Reclamation Dist.*, 488 F.3d 739, 751 (7th Cir. 2007).

Appendix D

A. The Breach Of Contract Instruction Was Plainly Erroneous.

The first questions under the plain-error analysis are whether there was an error and if so, whether it was "plain" in the sense of being obvious in retrospect. *Ammons-Lewis*, 488 F.3d at 751. A jury instruction is erroneous if it "failed to convey the correct message to the jury reasonably well" and "prejudiced the complaining party." *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998).

The district court gave the jury no guidance as to how to determine whether Prime breached the contract. As this Court has explained, the primary purpose of jury instructions is "to clarify issues for the jury and to educate the jury about what factors are probative on those issues." *Humphrey v. Staszak*, 148 F.3d 719, 724 (7th Cir. 1998). The instruction on Count I failed that purpose. Other than parroting the language of the back solicitation clause, Instruction 19 simply told the jury to "decide whether New Prime failed to do what it was required to do under the contract." A37; Tr.VI:117-18. The court did not provide any guidance as to how that determination should be made. The court's approach was insufficient under Illinois law, which makes it reversible error to simply place before the jury "the relevant language without explanation" and give "no instruction at all" on how to apply it. *Nat'l. Tea Co. v. Commerce & Indus. Ins. Co.*, 456 N.E.2d 206, 210 (Ill. App. Ct. 1983).

The Illinois Pattern Instructions ("IPI") set forth what the court should have done. IPI 700.01, which applies

to breach of contract claims where the contract terms are undisputed, provides (after describing the terms of the contract):

> [Plaintiff] has the burden of proving [defendant] breached the contract in the following way: [state here the plaintiff's contract claims].

IPI 700.10, which applies to breach of contract claims where contract formation is undisputed and, according to the Committee Note, "must be given in conjunction with 700.01," includes the following:

> [_____] claims and has the burden of proving that under the contract
>
> [_____] was required to not do the following: [state what the plaintiff claims to be the defendant's breach].
>
> [_____] claims it did not breach the contract because the parties agreed [_____] did not have to keep its promise unless [insert condition]

Here, other than filling in the parties' names, the court omitted what would be inserted in the IPI brackets.

Illinois case law confirms that jury instructions on Illinois causes of action must be more than bare-bones. They must, "in a concise and comprehensive manner, inform the jury of the issues presented, the principles of law to be applied, and the necessary facts to be proved

to support its verdict." *Grover v. Commonwealth Plaza Condo. Ass'n*, 394 N.E.2d 1273, 1279 (Ill. App. Ct. 1979) (reversing breach of contract verdict). Instruction 19 is woefully deficient in that regard.

On the one hand, if the court deemed the disputed contract terms to be unambiguous, it should have instructed the jury as to their meaning as a matter of law. See *Bechtold*, 19 F.3d at 325; *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993), aff'd, 513 U.S. 414 (1995). It should not have left the jury to decide the meaning of unambiguous terms simply because the parties disputed their meaning. "[T]he interpretation of contractual documents is an appropriate question for the jury only when the contractual language is ambiguous." *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293, 1298 (7th Cir. 1992). Thus, the court should have instructed the jury on the plain meanings of "solicit" and "traffic" and told it to apply those meanings to their factual findings to determine whether Prime breached the Agreement.

On the other hand, if the district court deemed the disputed terms ambiguous, it should have provided the jury with a framework or roadmap for resolving the ambiguities and deciding the meaning of the terms. See *Nat'l Tea Co.*, 456 N.E.2d at 210 (jury "should not be asked" to interpret ambiguous contract "without guidance from the court in the form of an instruction stating what conclusion must be reached if the jury finds certain facts to exist"). The court should have told the jury to weigh the evidence submitted on the meaning of those terms

and, based on its findings, determine whether Prime had solicited Loders based on knowledge of Loders' traffic obtained through Alliance.

"[I]t is the court's duty to instruct the jury that it should return one verdict if the facts are found one way and a different verdict if the facts are found otherwise." *Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 468 F.2d 225, 228 (7th Cir. 1972) (Stevens, J.). At the very least, instead of simply reprising the unconstrued contract language, the district court should have set forth the nature of the dispute over the meaning of that language. For example, the court could have told the jury that, according to Prime, "solicit" means a customer's request for business, not a carrier's response to such a request, and that the only traffic subject to the bar on solicitation is truck cargo made available by Alliance. Likewise, the court could have told the jury that, according to Alliance, "solicit" includes responses to customer requests without notifying Alliance and that "traffic" must be carried in bulk tankers and be quantitatively substantial. Instead, the court left the jury alone in the wilderness without a map. See *Dawson*, 135 F.3d at 1167 (ordering new trial where jury instructions left jury without "a meaningful definition" of key legal standard so that "the jury flew blind during its deliberations and judged all of the statements at issue without the necessary legal guidance").

Reversal is warranted where jury instructions had a "tendency to confuse or mislead the members of the jury or insufficiently inform them with respect to the applicable principles of law." 9C Charles Alan Wright &

Arther R. Miller, FEDERAL PRACTICE & PROCEDURE § 2558 (3d ed. 2008). That is precisely what occurred here. By failing to instruct the jury on the meaning of the back solicitation clause or how to determine that meaning, the court committed reversible error, warranting a new trial. See *Lalvani v. Cook County*, 396 F.3d 911, 913-14 (7th Cir. 2005) (ordering new trial due to faulty instructions); *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 770 (7th Cir. 2003) (same); *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (same); *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 229 (7th Cir. 1983) (same).

Moreover, the court's error was "plain," requiring a new trial under that standard as well. See *Choy v. Bouchelle*, 436 F.2d 319, 325 (3d Cir. 1970) (reversing for plain error where breach-of-contract instructions merely set forth the law "in abstract fashion" without relating it to the factual context); *MacEdward v.* N. *Elec.* Co., 595 F.2d 105, 109 (2d Cir. 1979) (failure to properly instruct jury was fundamental error requiring a new trial "even though no specific objection was made").

B. The Erroneous Instruction Affected Prime's Substantial Rights And Requires Reversal In The Interests Of Justice.

The district court's erroneous breach of contract instruction affected Prime's substantial rights, satisfying the third prong of the plain-error analysis. See *Production Specialties Group v. Minsor Sys., Inc.*, 513 F.3d 695, 700 (7th Cir. 2008). Allowing that error to stand would call into question the fairness, integrity, and reputation of the judicial system, warranting a new trial. See *id.*

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Alliance's case rested largely on its effort to broaden the meaning of "solicit" and narrow the meaning of "traffic." Prime's defense, in turn, rested largely on adhering to the plain contract language. Thus, Prime had a substantial right to have the jury properly instructed on this dispute and the jury's role in resolving it.

If properly instructed, the jury probably would have determined that Prime did not "solicit" business from Loders or that, if it did, the business was not "traffic" known to Prime only because of Alliance's efforts. As explained above, the evidence overwhelmingly supported this view (assuming this issue should have been submitted to the jury at all). The substantial possibility of a prejudicial impact is sufficient. See *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 265 (7th Cir. 1996) (vacating jury verdict where erroneous instructions "could have misled the jury"); *Dawson*, 135 F.3d at 1165 (mere "possibility" that improper instruction affected jury verdict sufficient to prejudice adversely affected party). Because there is a substantial chance that Prime would have prevailed at trial but for the inadequate instruction, the challenged error affected its substantial rights. Allowing this error to stand would undermine clear precedent that judges, not juries, determine the meaning of contracts as a matter of law. More importantly, letting the error go uncorrected would call into question the integrity of the judicial system with respect to the guarantee of a fundamentally fair trial.

III. THE DISTRICT COURT IMPROPERLY PERMITTED ALLIANCE'S EXPERT TO UNILATERALLY INTERPRET THE AGREEMENT.

Apart from its erroneous jury instruction, the district court committed reversible error by its rulings on expert testimony. The court improperly allowed Alliance's expert, Robert Walters, to testify as to the meaning of the back solicitation clause. Moreover, Walters provided the only opinion testimony on that issue because the court excluded countervailing testimony from Prime's expert, Lana Batts. Alliance's counsel seized on that disparate treatment to tell the jury that Walters' testimony was unrebutted. Although it is doubtful that either expert should have been permitted to testify on the meaning of the disputed contract terms, if it was permissible for one to do so, then the other should have been permitted to do so as well. With no instruction from the court on the meaning of the disputed terms, the upshot was that Alliance's expert alone instructed the jury on that issue. Prime was fundamentally prejudiced by this one-sided process and is therefore entitled to a new trial.

A. Alliance's Expert Improperly Instructed The Jury On The Meaning Of The Agreement.

The district court purportedly admitted Alliance's expert for the limited purpose of testifying to industry custom and practice with respect to back solicitation clauses. Tr.IV:18-20. But the court allowed him to tell the jury that the back solicitation clause means something other than what it says.

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With respect to the meaning of "solicit," Walters testified that it encompasses "direct communication deliberately or ***innocently*** done from the carrier to the shipper that will seek to exclude the broker from his commissions and his revenue." Tr.IV:36. He thereby told the jury that the proscribed solicitation could include ***unintentional*** conduct, such as, for example, Prime's neglecting to report Loders' overtures. The plain meaning of "solicit" bars such a construction, which would greatly broaden the type of conduct barred by the contract. But in any event, it was improper to permit Walters to provide his own construction of this disputed contract term.

Walters also told the jury that back solicitation clauses impliedly include a "carve out" obligation for the carrier. He testified that large carriers use "carve outs" to exempt their existing customers from a back solicitation clause (Tr.IV:36-37), effectively telling the jury that the lack of any such carve-out in the Agreement abrogates the Agreement's limiting of the solicitation bar to customers whose traffic was first made available by Alliance. Walters' testimony thereby sought to override the plain contract language, which allowed Prime to solicit any other "traffic" not first made available by Alliance.

Similarly, Walters' testimony that it is "normal practice" for a carrier to notify the 3PL if it had a "preexisting account" with a customer (Tr.IV:37-38) effectively told the jury that obtaining traffic independently from such a customer without providing such notice is a proscribed solicitation. Again, he thereby sought to inject a new term into the Agreement, which contains no such notification requirement.

Walters' testimony on the meaning of the back solicitation clause was improper. Under Illinois law, "contract interpretation is a question of law for which expert testimony would not be appropriate." *William Blair & Co.*, 830 N.E.2d at 773. Where, as here, there is no reason to deem the common terms "solicit" and "traffic" to be terms of art or trade, "expert opinion testimony to interpret contract language is inadmissible." *Delta Mining Corp. v. Big Rivers Elec. Corp.*, 18 F.3d 1398, 1402 (7th Cir. 1994). The rationale is plain-preventing an expert from "convey[ing] legal rather than 'expert' opinions." *RLJCS Enter., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494, 498 (7th Cir. 2007). "Argument about the meaning of *** contracts *** belongs in briefs, not in 'expert reports.'" *Id.* Because "the interpretation of contracts is for the judge" and "[c]ontracts mean what they say when read in light of legal principles," it follows that "what strangers to the parties' bargain would do is neither here nor there." *Westfield Ins. Co. v. Sheehan Constr. Co.*, 564 F.3d 817, 819 n.1 (7th Cir. 2009); accord *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977). Walters was just such a stranger to the parties' bargain whose testimony should have been deemed "neither here nor there."

B. Alliance's Improper Expert Testimony Was Highly Prejudicial In Light Of The Exclusion Of Prime's Proposed Expert Testimony.

Walters' expert testimony was particularly prejudicial to Prime in light of the district court's refusal to allow Prime's expert, Lana Batts, to offer countervailing

testimony. Indeed, Alliance's counsel multiplied the impact of Walters' improper testimony by emphasizing to the jury in closing argument that Walters' testimony was unrebutted. Since the court did not instruct the jury on the meaning of the disputed contract terms, the jury's hearing only a single expert from one side was highly prejudicial and prevented Prime from receiving a fair trial.

Batts was certainly as qualified to opine on the background and significance of back solicitation clauses as Walters. See *United States v. York*, 572 F.3d 415, 422 (7th Cir. 2009). She has served as the top official of leading trucking associations and had direct experience with back solicitation clauses. See pp. 14-15, *supra*. It is difficult to fathom how the district court could conclude, after noting Batts' "excellent qualifications," that Batts did not meet the *Daubert* threshold. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). As long as an expert's testimony "rests upon 'good grounds, based on what is known,' it should be tested by the adversary process competing expert testimony and active cross-examination—rather than excluded." *United States v. Mitchell*, 365 F.3d 215, 244 (3d Cir. 1998), quoting *Daubert*, 509 U.S. at 590.

Even if Batts' specific experience with back solicitation clauses was limited, her broad familiarity with the industry and the context in which such clauses are employed should have been sufficient. "Rule 702 is not so wooden" as to require that an expert have "intimate level of familiarity with every component of a transaction" and "firsthand dealings with the precise type of event that is at issue." *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 80 (1st Cir. 2004). Any gaps in Batts' specific

experience involved the "weight" of her testimony, "not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). Batts would have testified that because of the premium that carriers place on the privacy of their customer lists, it would be highly unusual for them to carve out customers by name from a back solicitation clause, as Walters said they do. Tr.V:185-86. Intimate, firsthand familiarity with back solicitation clauses is not necessary for testimony of this nature. The district court should have left the issue of the extent of Batts' experience with back solicitation clauses to Alliance's cross-examination and allowed the jury to compare her experience and credibility with those of Walters. See *Deputy v. Lehman Bros.*, 345 F.3d 494, 506 (7th Cir. 2003) (reversing exclusion of expert witness for reasons that primarily "concerned issues of credibility and persuasiveness").

The district court's expert testimony rulings were particularly prejudicial to Prime because they resulted in Walters being conferred with a "special aura of reliability." *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008). "[T]oo much emphasis" may be accorded "a single expert's opinion" absent "an opposing or independent expert to explain and counter the conclusions." *United States v. Nacchio*, 573 F.3d 1062, 1079 n.14 (10th Cir. 2009). That risk came to fruition in the closing argument of Alliance's counsel. As described above, he stressed to the jury that Walters' testimony was "unrebutted," in other words that Walters was ***the*** expert. Tr:VI:106. But he also built on Walters' testimony to give it apparently universal significance. Whereas Walters said that only "some" carriers (the largest ones) carve out their customers from a back solicitation clause, Alliance's counsel paraphrased

Walters' testimony as follows: "If you want to exclude a customer from a back solicitation clause, you tell the 3PL about the existence of that customer. You either do it at the time the contract is formed or when you get a load with a customer that you think is excluded from a back solicitation clause." *Id.* at 48. The court's improper expert rulings enabled this improper argument. The jury was effectively instructed on the law by Alliance's expert (aided by Alliance's counsel), not by the court. This fundamentally erroneous process warrants a new trial on Alliance's breach of contract claim.

CONCLUSION

This Court should reverse the judgment against Prime on Count I and remand with instructions to enter judgment for Prime. Alternatively, a new trial should be ordered on Count I.

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